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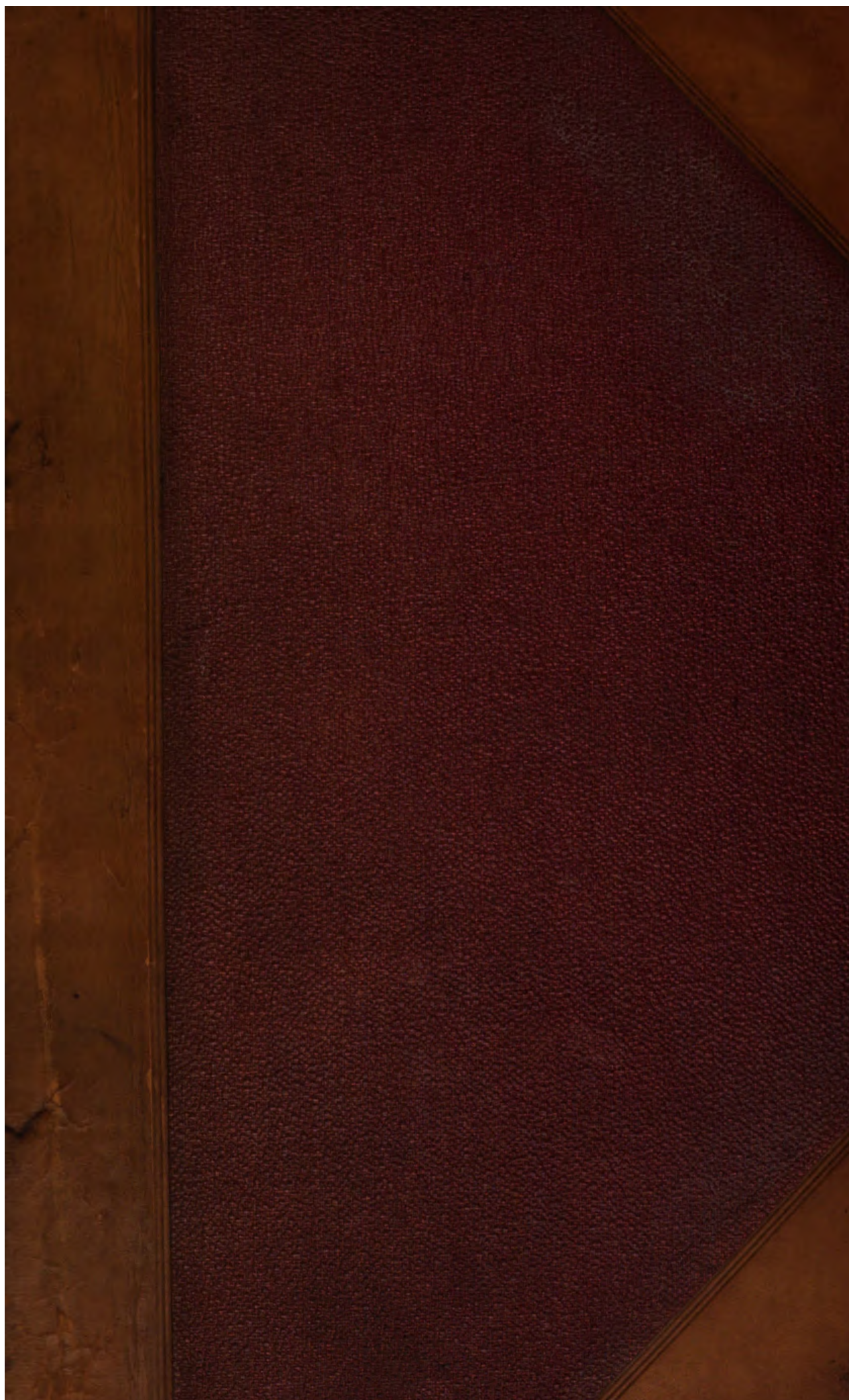
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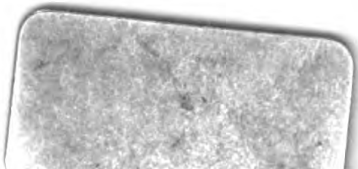


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# CASES

DECIDED IN

## THE HOUSE OF LORDS

ON APPEAL

FROM THE COURTS OF SCOTLAND.

1833. 1834.

REPORTED BY

JAMES WILSON AND PATRICK SHAW, EsQUIRES,  
ADVOCATES,

AND

CHARLES HOPE MACLEAN, EsQUIRE,  
BARRISTER AT LAW.

VOLUME VII.

CONTAINING

A GENERAL INDEX TO THE SEVEN VOLUMES.

EDINBURGH:

THOMAS CLARK, LAW BOOKSELLER, GEORGE'S STREET.

AND

SAUNDERS AND BENNING, LONDON.

MDCCCXXXIX.





LONDON :  
Printed by GEORGE E. EYRE and A. SPOTTISWOODE,  
Printers Street.

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*The following Noble Lords delivered Opinions on the  
Cases contained in these Reports :*

1825-7.

Lord Chancellor ELDON.

Lord REDESDALE.

Lord GIFFORD.\*

1828-30.

Lord Chancellor LYNTHURST.

Earl of ELDON.

Earl of LAUDERDALE.

Lord WYNFORD.

1831-4.

Lord Chancellor BROUGHAM.

Lord WYNFORD.

Lord DENMAN.

\* On the death of Lord GIFFORD the House was assisted, during part of the Session 1827, by the Lord Chief Baron ALEXANDER and by Sir JOHN LEACH the Master of the Rolls.

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IT may be proper to give the following explanation as to the order in which these Reports stand :—They were originally commenced by Mr. Shaw, who published, in Two Volumes, the Reports of the Cases decided in the Years 1821, 1822, 1823, and 1824. They were continued from 1825 by Mr. Wilson and Mr. Shaw. It was intended that they should terminate with the Cases decided in 1831, and that in future the Reports should be conducted by Mr. Wilson and Mr. Courtenay. These Gentlemen accordingly published Reports of the Decisions in 1832, as Part First of Volume First of a new series ; but in consequence of the retirement of these Gentlemen from the Bar, Mr. Shaw undertook, with the assistance of Mr. Maclean, to complete the Reports for the years 1833 and 1834. In the mean time Mr. Shaw and Mr. Maclean had commenced another Series from 1835, which has been continued till 1838, and consists of Three Volumes.

The Reports of the years 1832, 1833, and 1834 have been included in Two Volumes, entitled Vols. VI. and VII. of WILSON and SHAW.

By various circumstances the final completion of the Reports for the years 1833 and 1834 has been impeded; but this is now accomplished. In order to avoid confusion, the proposed series of WILSON and COURTENAY has been laid aside, and the Reports therefore stand thus:—

|                                     |   |   |          |
|-------------------------------------|---|---|----------|
| SHAW, from 1821 to 1824             | - | - | 2 vols.  |
| WILSON and SHAW, from 1825 to 1834  | - | - | 7 vols.  |
| SHAW and MACLEAN, from 1835 to 1838 |   |   | 3 vols.  |
|                                     |   |   | —        |
| In all                              | - | - | 12 vols. |

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Dec. 1839.

**C A S E S**  
 DECIDED IN THE HOUSE OF LORDS,  
 ON APPEAL FROM THE  
**COURTS OF SCOTLAND,**  
 1833—1834.

[27th August 1833.]

WILLIAM MILLER and others, Appellants.—*Dr. Lushington—Anderson.* No. 1.

JOHN MILLER and others, Respondents.—*Lord Advocate (Jeffrey)—Murray.*

*Testament—Succession—Trust.*—A party conveyed his property to trustees, with directions to pay the rents to J. during his life, and if he married and had children to convey the property to him; but in the event of his marrying and having no children, to convey the property to W., his heirs and assignees whatsoever. W. predeceased J. without issue, and J. died without being married. Held (affirming the judgment of the Court of Session), that no right vested in W. and J.; and that the heir of line, and not the heir of conquest, had right to the property.

**T**HE late John Davidson, writer to the signet, married Miss Martha Miller, but had no children. He executed a trust disposition of his estate in favour of Sir William Miller (Lord Glenlee) and others, for the purpose *inter alia* to be immediately mentioned. Sir William's eldest son was Thomas; his second son, William, was a lieutenant colonel in the army; and his third son was John, a writer to the signet. The chief purpose of the deed was expressed in these terms:—"I appoint

2D DIVISION  
 Lord Fullerton

No. 1.      “ my said trustees to pay the clear rent of my lands  
 27th August      “ and estate aforesaid; that is, Stewartfield, Ulston,  
 1833.      “ and acres aforesaid, Halltree, Kirkotter Chapel, and  
 MILLER      “ Cairntows, to Joseph Davidson my cousin, Fellow  
 and others      “ of Cambridge, during his life; and if he marries and  
 v.      “ has children, then to dispone to him and the heirs  
 MILLER      “ of his body the lands and estates, and acres and  
 and others      “ pertinents thereof\*, to be dispomed by them at  
                   “ follows; viz., the lands and estate of Stewartfield  
                   “ and Ulston, and acres aforesaid, to William Miller,  
                   “ second son to the said Sir Thomas † Miller, his heirs  
                   “ and assigns whatsoever; and the said lands of Hall-  
                   “ tree, Kirkotter Chapel, to the said Robert Dundas,  
                   “ and the heirs succeeding to him in the estate of  
                   “ Arniston, in the precise terms of the entail of the  
                   “ estate, only with this difference, that the said Robert  
                   “ Dundas, and these heirs in their order, may give the  
                   “ life-rent thereof to their widows.” And in a subse-  
                   “ quent part of the deed he provided, “ and if the  
                   “ said Joseph Davidson does not marry, nor has not  
                   “ children, I appoint my said trustees to dispone the  
                   “ lands of Cairntows to the Right Honourable Henry  
                   “ Dundas, one of His Majesty’s secretaries of state,  
                   “ his heirs and assignees whatsoever.” He also made  
 certain provisions for Thomas, the eldest son; but he  
 revoked these by a codicil, as Thomas was “sufficiently  
 “ provided for” otherwise. Thomas died, leaving a son,  
 William (the appellant); Colonel William Miller was  
 killed at Waterloo in June 1815, being unmarried; and  
 Joseph Davidson survived till the 21st of October 1828,  
 when he died also unmarried.

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\* Both parties were agreed that the following words had been omitted, and should be inserted, at this part of the deed; viz., “ and if the said “ Joseph Davidson does not marry, nor has no children.”

† The name in place of Thomas should have been William.

Under these circumstances John Miller, the third son of Sir William, brought an action against the trustees, setting forth, “ that the said deceased Lieutenant Colonel Miller, who is the person mentioned in the clause of the aforesaid deed of settlement relating to the lands of Stewartfield, Ulston, and others, was mortally wounded at the battle of Quatre Bras, and died unmarried on the                    day of June 1815; and that the said Joseph Davidson having died on the 21st of October last, 1828, without being married and leaving children, the said John Miller applied to said trustees, requiring them to denude in his favour, and to dispone the said lands and estate of Stewartfield, Ulston, and acres about Jedburgh to him, as being the person to whom the description of heir devolved; but they refuse and delay to proceed in the execution of their trust, and will not dispone the said lands as required, alleging that William Miller, son of the late Thomas Miller, the immediate elder brother of the said deceased Lieutenant Colonel William Miller, may claim said lands as heir of conquest to the said deceased Lieutenant Colonel William Miller, and that they cannot with propriety denude in favour of the pursuer until he shall ascertain his right as against the said William Miller:—Therefore it ought and should be found and declared, by decree of our Lords of Council and Session, that the said Lieutenant Colonel William Miller having died unmarried, the pursuer, his immediate younger brother, has in him the character of heir whatsoever of the said William Miller: And it ought and should be farther found and declared, by decree foresaid, that the said William Miller, son of the said deceased Thomas Miller, has no right or

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“ title whatever to the said lands and estate ; but that  
 “ the pursuer, the said John Miller, has the only good  
 “ and undoubted right and title to all and whole the  
 “ said lands and estate of Stewartfield, Ulston, and  
 “ acres about Jedburgh, in virtue of the deed of settle-  
 “ ment and provision of the said deceased John David-  
 “ son ; and that the same do pertain and belong in  
 “ property to him, the said John Miller, as holding the  
 “ character of the heir of line, or heir whatsoever of the  
 “ said Lieutenant Colonel William Miller, and not to  
 “ the heirs of conquest of the said deceased Lieutenant  
 “ Colonel William Miller.”

In defence the appellant, William Miller, insisted that the word “heirs” must be taken in reference to the nature of the succession; that the right vested in Colonel Miller as disponee, and therefore the appellant had right to the property as the heir of conquest of Colonel Miller.

The Lord Ordinary appointed the question to be argued in cases, and issued this note of his opinion:—  
 “ On the suggestion of the parties the Lord Ordinary  
 “ has ordered cases ; but he thinks it right to intimate  
 “ to them the opinion which he at present entertains.  
 “ He does not think that there was vested in Colonel  
 “ William Miller any right, or even any title, which  
 “ could afford a proper occasion for a service, or  
 “ which could possibly be considered as conquest in  
 “ his person. In one sense, no doubt, the settlement  
 “ may be viewed as being in favour of William Miller,  
 “ as such an expression may be and is frequently used  
 “ in regard to every person on whom a deed confers  
 “ an interest, whether present or postponed, certain  
 “ or contingent ; and so also it may, perhaps, be loosely  
 “ said that the heirs of Colonel William Miller claim

“ through him, as it was presumably through the inter-  
 “ vention of the favour entertained for him by the  
 “ disponent that his heirs were called to the succession.  
 “ But still, considering the terms of the settlement,  
 “ and the circumstances in which it took effect,—keep-  
 “ ing in view that by the clause, even as construed by  
 “ the defenders, the trustees were to dispoise the lands  
 “ to William Miller only in the event of Joseph  
 “ Davidson not marrying, nor having children, and  
 “ that William Miller died before Joseph Davidson,—  
 “ it is clear that the settlement never had any legal  
 “ operation in favour of Colonel William Miller himself;  
 “ and that, consequently, as no right in virtue of it  
 “ ever existed in his person, his heirs do not take as  
 “ in his right. The case resembles, as nearly as can  
 “ well be conceived, that of a legacy bequeathed to a  
 “ person and his executors, in which, if the legatee  
 “ predecease the testator, the executors take in their  
 “ own right, and not as in right of the legatee. ‘ A  
 “ ‘ legacy, when it is devised to a legatee and his exe-  
 “ ‘ cutors, is not evacuated by the predecease of the  
 “ ‘ legatee, but passes after the testator’s decease to the  
 “ ‘ legatee’s executors, not by any right which these exe-  
 “ ‘ cutors derive from the legatee, to whom that legacy  
 “ ‘ never belonged, he having died before it could have  
 “ ‘ effect by the testator’s death, but in their own right,  
 “ ‘ as conditional institutes in the legacy.’\* According  
 “ to this principle, and there being on the present  
 “ occasion a conditional institution of Colonel William  
 “ Miller and his heirs, it would seem to follow that  
 “ the clause in dispute must be held to involve the  
 “ institution of Colonel William Miller, if he survived  
 “ the event forming the condition, and if he did not

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\* Ersk. b. iii. tit. 9. sec. 9.

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“ survive, the institution of his heirs; in which case, as  
 “ in that of a direct disposition to the heirs of a par-  
 “ ticular individual, it appears to the Lord Ordinary  
 “ that the term must be construed designative, as de-  
 “ noting the heirs of line, the persons to whom the  
 “ general character of heir, unconnected with any right  
 “ in the person of the ancestor, would apply.” There-  
 after his Lordship, on the 10th of July 1830, in  
 respect of the reasons assigned in his note of the 12th  
 of December 1829, repelled the defences, and de-  
 clared and decerned in terms of the conclusions of the  
 libel, but found no expenses due. To this interlocutor  
 the Court adhered on the 19th of January 1831.\*

William Miller appealed.

*Appellant.*—1. The disposition of the estate which  
 Mr. Davidson made in favour of his cousin Joseph in  
 life-rent, and Colonel William Miller in fee, vested in  
 each of them respectively a right of life-rent and of fee  
 from the death of the testator; and although the beneficial  
 interest of Colonel Miller was suspended till it should  
 be seen whether Joseph Davidson married or not, yet  
 the radical right was vested in Colonel Miller, and the  
 trustees held the feudal fee for him. A fee cannot be  
 in pendente, whether held by trustees or not. The trus-  
 tees may hold the fee so as to satisfy the feudal principle,  
 but the beneficial interest in the fee must be vested in  
 some person absolutely. In the present case it was  
 vested in Colonel Miller. It is true that his right might  
 be defeated by Joseph marrying and having a family,  
 so that he was merely a conditional disponee; but till  
 that event took place, the radical right belonged to him;

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\* 9 S., D., & B., 295.

and as the condition never took place, the quality attached to the fee did not affect the vesting.\* The respondent claims as heir of Colonel Miller, and thereby necessarily admits that there was a vested right in him; and indeed, there can be no doubt, that if, for example, either Joseph or the trustees had begun to cut down standard timber, Colonel Miller would have had a title to use legal measures to prevent them from doing so, which shows that there was a right vested in him.†

2. Assuming that the right to the fee, though subject to be defeated by Joseph marrying and having children, vested in Colonel Miller, then it devolved at his death upon his heir of conquest. The disposition is taken to Colonel Miller, “his heirs and assignees whatsoever;” and as he acquired right to the estate by a singular title, and not in the ordinary course of succession, the party entitled to take as his heir is the heir of conquest, and not the heir of line. It is not necessary, in order that the succession should devolve on the heir of conquest, that the right should have been feudalized; it is sufficient if it be a right which is capable of being feudalized.‡ The intervention of trustees makes no difference on this rule of law.§ Even where a right is liable to be defeated, still the question of succession ought to be decided *secundum subjectam materiam*, and not by the circumstance of the survivance of the disponent.

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\* *Wellwood's Trustees v. Wellwood*, 24th Feb. 1791, *Bell's Cases*, p. 191; *Wallace v. Wallace*, 28th Jan. 1807, *Mor. No. 6*, Appendix Clause; *Nelson v. Bailie*, 4th June 1822, 1 S. D. 458, new ed. 427; *Christie v. Paterson*, 5th July 1822, 1 S. D. 543, new ed. p. 498; *M'Dowal and Selkirk v. Russell*, 6th Feb. 1824, 2 S. D. 682, new ed. 574; *Smith v. Leitch*, 2d June 1826, 4 S. D. 659, new ed. 665.

† *Tait v. Maitland*, 2d Dec. 1825, 4 S. D. 247, new ed. 253.

‡ *Robertson v. Halkerston*, 7th July 1675, *Mor. 5605*; *Creditors of Menzies*, 8th Dec. 1738, *Mor. 5519*; 3 *Stair*, 5, 10.

§ *Duke of Hamilton v. Earl of Selkirk*, 8th Jan. 1740, *Mor. 5615*.

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It seems strange to maintain, that if Colonel Miller had survived Joseph Davidson, and the latter had died unmarried, that in a question of this nature one heir should be understood as called, and another and a different one in the event of Colonel Miller predeceasing Joseph Davidson. It may be that Colonel Miller's right was defeasible; but as it was never defeated, his heir should be preferred; and that heir is the heir of conquest.\* If the respondent claims as a substitute to Colonel Miller, which indeed is his true character, he ought to serve to him in order to establish his propinquity; but he has not done so. He cannot be regarded as a conditional institute because there is another person called to the succession before him; and it is not sufficient to say, that that person did not survive the purification of the condition which suspends his right.†

*Respondent.*—1. It was impossible that, during the lifetime of Joseph Davidson, Colonel Miller could have any vested right in the lands. He was in the situation of a conditional institute, who, in case he should survive Joseph Davidson, and if that gentleman should not marry nor have children, would be entitled to claim the lands. He was not even a substitute to Joseph and his children, for if Joseph had married and had had children the conditional institution of William Miller would have been instantly evacuated. It may be true that, upon feudal principle, a fee cannot be in pendente,

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\* Short v. Short, 13th Feb. 1771, Mor. 5615.

† Menzies v. Menzies, 18th Jan. 1803, (not reported,) affirmed on appeal 20th July 1811; Mackenzie v. Mackenzie, 24th Nov. 1818, F.C.; Creditors of Graitney, July 1727, Mor. 14855; Forbes v. Forbes, 3d Aug. 1756, Mor. 14859; Peacock v. Glen, 22d June 1826, 4 S. D. 742, new ed. 749; Colquhoun v. Colquhoun, 16th Dec. 1828, 7 S. D. 200, Remitted 17th Dec. 1831, 5 W. S. 32.

for there must always be a vassal entitled to take the fee, when it is left vacant by the death of the vassal last infeft; but this rule does not apply to the case where the fee is vested in trustees to hold for contingent and possible heirs. In the present case Colonel Miller had no sort of fee whatever, for it was only upon the contingency of Joseph Davidson dying without children that he could ever have any present or vested right. Joseph Davidson might have maintained, with as much if not more reason, that he himself was the fiar, subject only to a substitution or conditional institution in favour of Colonel Miller, in case Joseph should die without heirs of his body, than Colonel Miller could have maintained that he was fiar during the lifetime of Joseph; for he was a contingent fiar, and the fee would have vested in him or his children on their coming into existence. It seems, therefore, impossible to maintain that there was a contingent fee vested at one and the same time in him and Colonel Miller.\*

2. In treating of conquest, all the authorities assume it to be essential that the right shall have vested in the alleged ancestor, and that it be a right capable of being feudalized.† Nay, for a long period infeftment was considered essentially necessary. But although the rule has been relaxed, so that it is sufficient that the right be of a nature capable of being feudalized, yet it has been uniformly held that there must be a present right, either feudal or personal, vested in the ancestor at the period of

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\* *Burden v. Smith*, 27th April 1738, *Craigie and Stewart's Reports*, p. 214; *Glendinning and Gaunt v. Walker*, 13th Nov. 1825, 4 S. D. 237, new ed. 241; *Buchanan v. Downie*, 12th Feb. 1830, 8 S. D. 516.

† *Quoniam Attachiamenta*, and statutes Robert III. cap. 3; *Craig*, lib. 1. dig. 10. t. 32; 3 *Stair*, 5, 10; 3 *Ersk.* 8, 14; 3 *Bankton*, 4, 21.

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his death\*; but in no case has it ever been held that a contingent or possible claim is to be regarded as conquest.

By the death of Colonel Miller, without any right having vested in him, the conditional institution of his heir came into operation, and took effect on the death of Joseph Davidson. The respondent is that conditional institute; and although he is described as "heir," there is no necessity for a service, because the fact that he is that heir can, if disputed, be ascertained without the necessity of a service. The term "heirs whatsoever" embraces heirs of every character and denomination; but the interpretation of that term must be regulated by the nature and state of the right when the succession opened. According to this, the heir called as the conditional institute cannot be the heir of conquest, because such an heir can take in no case where there has not been a vested right; and therefore the party described as heir must be the heir of line.

LORD CHANCELLOR.—My Lords, in the case of *Miller v. Miller*, which was argued before your Lordships with very great ability, I was induced, in consequence of what was said of the very narrow division of the learned Judges in the Court below, and in consequence of the importance of the case, to take time to consider it. With respect to what is called the very narrow division of the learned Judges, Lord Glenlee, it appears, took no part, which left only three Judges to dispose of the question. Two Judges gave an opinion the one way, and the other Judge the other way. It is

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\* Hope Minor Prac. p. 171; 3 Mackenzie, 87; Robertson v. Halkerton, 7th July 1675, Mor. 5605; Menzies v. Menzies, 8th Dec. 1738, Mor. 5519; Lord Selkirk v. Duke of Hamilton, 8th Jan. 1740, Mor. 5615.

true this was the narrowest division by which three learned Judges could be subdivided; yet it would certainly be as accurate to say, that there were two to one in favour of the decision. The very learned opinion of the Lord Ordinary, of the 12th of December 1829, to whose interlocutor, in the first instance, their Lordships adhered, and those of the learned Judges who pronounced the interlocutor from which this appeal was presented, contain reasons to which I am not able to perceive any answer; and having given the utmost attention to the very elaborate argument addressed to your Lordships from the bar, and to the cases to which your Lordships were referred, I am satisfied,—though the decision may not be free from all doubt, yet, upon the whole, on the grounds stated in those reasons very distinctly and satisfactorily,—that the Court below have come to a right conclusion, and that the interlocutors of the 10th of July 1830 and the 19th of January 1831 ought to be affirmed; but in this case, my Lords, both looking to the nature of the pleadings, and the importance of the case, I am of opinion that no costs should be given.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

RICHARDSON and CONNELL—MACDOUGALL and  
BAINBRIDGE, Solicitors.

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[27th August 1833.]

No. 2. JOHN MILLER, WILLIAM RAY, and WILLIAM THOMSON, Appellants.—*Lord Advocate (Jeffrey)—Wilson.*

MRS. MOODIE or ANDERSON, Respondent.—*Murray—Stewart.*

*Obligation.*—Circumstances in which held (affirming the judgment of the Court of Session), that a party who had granted an obligation to discharge a bond, and received part of the money, was relieved from implement of it on restoring the money.

*Writ.*—Question, Whether an obligation to grant a discharge of a heritable bond requires to be holograph or tested?

*Stamp.*—Question, Whether an unstamped obligation can be stamped after the cause has been heard in the Appeal Court?

1ST DIVISION.  
—  
Lord  
Meadowbank.

THE respondent and her sister held a heritable bond over a property for 2,000*l.*, which they assigned in 1821 to a third party and received the amount, the respondent's share being 1,500*l.* She was at this time a widow, and had two children, to whom James Anderson, their paternal uncle, was served tutor at law.

The appellant, John Miller, was proprietor of certain heritable subjects in the village of Milnethort, over which he had granted an heritable bond for 275*l.* in favour of the other appellant, Wm. Ray. An arrangement was in 1824 entered into between the agent of the respondent and Mr. Ray, by which it was agreed to

transfer this bond to the respondent on payment of its amount to Mr. Ray. She alleged that in sanctioning this agreement she trusted implicitly to her agent, who was nearly related to Mr. Anderson, the tutor. The transfer was accomplished by a deed of assignation in favour of the respondent in life-rent, and to her two children nominatim, "and their respective heirs and assignees, in fee," on which infestment was taken. The money was part of the above sum of 1,500*l.* Thereafter both her children died, and their uncle Mr. Anderson was their heir at law. The subjects over which the bond extended were sold in 1828; and on the 1st of May of that year, the respondent addressed to Mr. Ray a letter in these terms:—

"Sir, I hereby acknowledge that you have now and  
 "formerly fully and finally settled and paid to me the  
 "bond and disposition in security granted to you by  
 "John Miller, portioner in Milnethort, for 275*l.*, and  
 "assigned by you to me: And I declare that I have no  
 "farther claim under the said bond. And I hereby  
 "oblige myself to subscribe and deliver a formal and  
 "valid discharge as soon as the same can be prepared."

This document was neither stamped nor holograph, but the authenticity of it was not denied, and it was admitted that part of the money was paid to her. A few days afterwards the other appellant, Mr. Thomson, became bound to the purchaser that a discharge should be granted by the respondent.

It was then insisted, that, in order to grant a valid discharge, a title must be made up to the fee by Mr. Anderson, as the heir at law of the children, and that the respondent was bound to get this accomplished, or otherwise to make up a title in her own person. She

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resisted this; whereupon the appellants brought an action before the Court of Session, in which they concluded that she should be decerned “to make up a complete  
 “ and valid title in her person to the foresaid heritable  
 “ debt, and to grant and deliver to the pursuers a  
 “ formal and valid discharge and renunciation thereof,  
 “ and of the bond and disposition in security, &c. such  
 “ discharge being granted at the pursuers expense.”

In defence she pleaded that she had been altogether misled as to the form of the title—that she had always supposed that the absolute fee belonged to her, and that her children were to succeed her only on her death; and that she never intended that their heirs should, in the event of their dying without issue, acquire right to the bond. She farther objected that the document founded on was not binding on her, being improbable and not stamped. The Lord Ordinary, on the 25th of May 1830, “sisted process for three weeks, in order  
 “ that the defender may take the steps necessary to  
 “ enable her to furnish a regular and valid discharge of  
 “ the bond mentioned in the libel.” And on the 2d June he pronounced this other interlocutor:—“ The  
 “ Lord Ordinary, in respect the defender maintains  
 “ that she is not bound at her own expense to take any  
 “ steps for making up and completing a title to the  
 “ heritable bond in question, and therefore declines to  
 “ take any steps under the interlocutor of 25th May  
 “ last,—repels the defences, and decerns against the  
 “ defender in terms of the whole conclusions of the  
 “ libel; finds expenses due,” &c.

The respondent reclaimed to the Inner House, and renewed an offer she had formerly made to repay the money which she had received; whereupon the Court,

on 4th March 1831, pronounced this interlocutor:—  
 “ Recall the interlocutor reclaimed against; and in  
 “ respect of the offer made by the defender on the 19th  
 “ December 1828 (which offer has now been repeated  
 “ by her counsel), of consent, decern against her for  
 “ said sum, with interest due thereon since the 1st day  
 “ of May 1828, and until paid; and quoad ultra  
 “ assoilzie her from the conclusions of the action, and  
 “ decern: Find the pursuer liable in expenses, &c., sub-  
 “ ject to modification.”\* These were modified to 90%.

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The pursuers appealed.

*Appellants.*—The respondent was effectually bound, by her obligation of May 1828, to procure and grant a valid discharge of the bond. Her allegations as to having been misled by her own agent as to the terms of the transfer are quite irrelevant in the present question. The appellants are not said to have been participant in so misleading her; and in fact the transfer is taken precisely in the same terms in which she had previously executed a deed of settlement. Equally irrelevant is the plea that the obligation is not tested or holograph, because it was followed rei interventu, the greater part of the money having been paid to and received by her on the faith of it. If there were any weight attachable to the circumstance that it is not stamped, it is still competent to have it stamped.

*Respondent.*—The document libelled, being improba- tive, cannot establish any obligation against the respon- dent; and even if it were probative, being not stamped,

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\* 9 S. D. B., 542.

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it cannot be looked at, and it is not competent to have it stamped in the Court of Appeal. Nevertheless the respondent has always been willing to grant a discharge according to her undertaking, which was on the footing that the bond belonged to her alone, and not that it belonged to the heir at law of her children, and she never contemplated any obligation to the effect of being at the expense of making up titles in his person. Besides, as the whole matter is founded on error, ample justice has been done to the appellants by the interlocutor ordering the money to be repaid.

LORD CHANCELLOR.—My Lords, I shall not now move your Lordships to dispose of this case finally, as there is one point at least which I wish to have the opportunity of looking further into, assuming that we are now to dispose of the question on the ground taken in the Court below, and passing over the two objections which arose upon the instrument not being stamped; 1st, Whether the instrument was such as to require a stamp, and if so, whether the stamping it now will do? I take it, that there can be no question at all that an instrument can be stamped pending the original hearing; and, 2dly, How far the pursuer, the present appellant, would have gone on in the case without that instrument altogether? Leaving those two points on one side, as the case has been argued at your Lordships bar on both sides upon the ground on which it was disposed of in the Court below, I should wish on one of the matters here argued to have an opportunity of further consideration before moving your Lordships to dispose of the question. My Lords, I should not have troubled your Lordships upon the present occasion had

it not been for some things which were thrown out at the bar with respect, not to the question of costs, because that has been, in the course of conversation during the argument, I think, put out of the way, but with respect to the small amount of interest involved in this question. My Lords, it never can be allowed, particularly in a Court of Appeal, to be urged as an argument against resorting to the Court for redress that the stake in the question is too small. If that topic were allowed to be urged here, or at least to be entertained by any Court of Appeal, to what would it lead?—to what purpose? Courts below might deal with small cases—with cases under certain undefined amounts—cases of a moderate or a small amount, with carelessness, and with indifference, as if it signified not how the case stood, or how hasty or how erroneous their decisions might be upon matters of that description. Yet those matters may be of the greatest importance to the parties concerned; and it is a lesson that never can be taught to any suitors, that they may hold others out of their rights with impunity, or with the chance of those others not having all the redress which the Court of Appeal affords, provided those rights are below a certain undefined amount. My Lords, I am perfectly certain that no courts in this country, whatever the suitors may think, ever proceed upon any such grounds, but that they apply their minds with the same attention, with the same watchfulness, and with the same conscientiousness and scrupulous anxiety to the discharge of their important duties in small cases as in large ones. We often lament the bringing of cases here when the amount is so small that the result of the appeal cannot possibly save the party from a loss owing to that appeal; we also lament a misdecision of

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such cases below, which leads to this evil; but this is all we can well correctly say on the smallness of amount. My Lords, I thought it necessary to say thus much in consequence of some remarks that were made respecting the amount of the stake in this cause. I have seen many much smaller. The smallness of the amount is no reason why it should not meet with and receive the utmost possible attention here; and why error that has been committed—if error has been committed—should not be set right by your Lordships. For the reason I first stated, I shall move your Lordships that the further consideration of this question may be postponed.

Adjourned.

LORD CHANCELLOR.—My Lords, in the case of *Miller v. Anderson*, which stood over in consequence of my having some doubt particularly as to the question of costs, having now fully considered the matter, I am of opinion that the interlocutors ought to be affirmed, and that costs ought in this case to be given. I do not feel it necessary to enter further into the case than merely to suggest to your Lordships the propriety of affirming the interlocutors complained of, with costs, not exceeding 150*l.*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of one hundred and fifty pounds for her costs in the said appeal.

CRAWFURD and MEGGET—W. GOODALL, Solicitors.

[27th August 1833.]

DUNCAN MACDOUGALL, Appellant.—*Lord Advocate* No. 3.  
(*Jeffrey*).

JEAN CAMPBELL and others, Representatives of the late  
ARCHIBALD CAMPBELL, Respondents.

*Triennial Prescription*.—Held (affirming the judgment of the Court of Session), that the triennial prescription applies to the wages of a servant. Question, Whether that prescription applies to the purchase of cows singly and forming part of an account current?

*Payment—Presumption*.—Circumstances under which payment was presumed from lapse of time.

THE appellant, on the 26th of January 1829, brought an action before the Court of Session against the late Archibald Campbell, alleging that the latter was “justly  
“ addebted, resting, and owing to the pursuer the sum  
“ of 161*l.* sterling, being the amount of an account of  
“ wages for servitude performed by the pursuer for  
“ behoof and on account of the said Archibald Camp-  
“ bell, from the term of Whitsunday 1811 to the term  
“ of Whitsunday 1822; item, the value of nine stirks  
“ furnished and sold by the pursuer to the said Archi-  
“ bald Campbell at the rate of 3*l.* each; item, cash  
“ payments made by the pursuer or others on his  
“ account to the said Archibald Campbell, all conform  
“ to a particular account thereof rendered to the said  
“ Archibald Campbell, to be produced in process, and  
“ herein held as repeated brevitatis causa.” The  
conclusion was for payment, under deduction of such

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sums as Campbell could show he was entitled to deduct. The latter denied resting owing, and pleaded prescription as to the wages; admitted that he had got the stirks, but denied that they were of the value alleged, and pleaded compensation; and in regard to the cash, he denied that he had ever got it, and maintained that the reverse could be proved only by his writ or oath.

The Lord Ordinary, on the 3d of March 1830, sustained the plea of prescription, assoilzied the defender from the conclusions of the action, and of consent of the defender found no expenses due. To this interlocutor the Court, on the 22d of June 1830, adhered, but remitted to the Lord Ordinary to allow the appellant to make a reference to oath if he saw fit.\* The appellant declined to do so, and appealed. No appearance was made for Campbell, who had in the meantime died, and was succeeded by his son and daughter.

*Appellant.*—Although it may be true that the triennial prescription applies to the wages of servants, yet, if the constitution and non-payment be admitted, it is not necessary to have recourse to a reference to oath. In the present case, a certificate of character by Mr. Campbell in favour of the appellant was produced, which on fair construction imports an admission that the appellant had been in the service of Mr. Campbell for the period libelled; and it was admitted on the record, that the appellant had resided in a cottage on Mr. Campbell's farm, and been occasionally employed to work on it. On the other hand, it was not alleged that any wages had been paid.

The plea of prescription does not apply to that part

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\* 8 S., D., & B., 959.

of the claim which relates to the stirks\*, for although they form part of the account, and were delivered at separate times, yet each sale must be regarded as a separate and distinct transaction, and not of the nature of an ordinary account current. But even if the plea of prescription were competent (and in fact it was not pleaded) it would be elided by the fact that the appellant, during the currency of it, was in a state of insanity. This was stated by the respondents themselves, although it was done for the purpose of making the Court believe that the claim was altogether a delusion.

By the judgment the respondent was assoilzied simply in respect of the triennial prescription; but such a plea is inapplicable to the case of loans of money, and therefore it ought to be reversed.

LORD CHANCELLOR.—My Lords, the last case that stands for your Lordships judgment to-day is the case of Macdougall v. Campbell, which was argued before your Lordships on one side only by the learned counsel for the appellant. It was not argued on the other side of the bar, the respondents being unwilling, I suppose, to incur the expense of appearing; and I do not at all regret the course taken, as it has saved unnecessary expense. In advising your Lordships to affirm the interlocutors complained of, as no counsel has appeared for the respondents, but only on the part of the appellant, it is unnecessary to call your attention minutely to the facts of the case; but I will shortly state the grounds upon which I think the interlocutors may well stand, with a certain slight alteration which I will suggest to your Lordships.

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\* Bell's Principles, p. 152; Baird, February 16, 1688, Mor. 11,092; Tait on Evidence, 457.

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The subject matter of the claim, as stated in the appellant's case, was of a threefold description: 1st, a claim for wages; 2dly, for money advanced; and, 3dly, for the price of certain beasts or stirks sold by the one party to the other; and the questions brought before your Lordships, with respect to this claim, are, first, a question raised by the plea of prescription; and there can be no doubt, indeed it hardly seems to be denied, that this is a good plea, if there is no admission of liability, or any thing else to repel the defence. Indeed, the argument of the appellant abandoned that point, as it applied to 120*l.* out of 161*l.* upon one calculation, and out of 154*l.* upon the other, according as you take the money paid to be 7*l.* or 14*l.* But at all events, taking either of the calculations, it leaves a very small matter in contest between the parties; and I cannot help thinking that it is truly lamentable to see a claim of 20*l.* or 30*l.* come before your Lordships, and occupy your time to the inevitable injury of the parties, whichever way it is decided; because, even should we reverse the decision, the costs out of pocket must put the appellant to an expense, if he had not been a pauper, that would have exceeded any thing he could have got, even if the extraordinary course had been pursued of giving him his costs of the appeal. The next part of the claim is for 7*l.* or 14*l.* alleged to have been paid by the appellant to the respondent, but not admitted by him. Now, the defence to this does not rest upon prescription, but on the ground that there is not the kind of evidence required by the law of Scotland, and that it cannot be proved by parole evidence, but only *scripto vel juramento*; and there are in this case neither. We are, therefore, now brought to the only other remaining matter,—the money alleged

to be due for the nine stirks. To this prescription was pleaded; and the reply was, that the delivery of goods is not within the triennial prescription: neither is it, clearly. At the same time, if I deliver a horse, or a cow, or a parcel of goods in one transaction, the triennial prescription can be pleaded as a plea to a demand for those goods. But it is not true, at least I cannot discover, that prescription was pleaded to this part of the demand. The defender may have used the lapse of time as an argument, and a stronger cannot well be used to rebut the claim, by raising the presumption of payment; but I do not think that the triennial prescription is pleaded to that part of the demand, though there is something said of it in the judgment of the Lord Ordinary; and to that I shall call your Lordships attention, in the alteration I would suggest. It may, however, be observed, in passing, that even if such a plea had been pleaded, this is not a case in which it is so plainly excluded as it is assumed to be; for we have not here a single transaction, but a part of a course of dealing extending through a number of years, and I doubt much whether it does not come under the head of "merchants' accounts." But there is no necessity to decide that either way. The pursuer's claim is met with the lapse of time on the part of the respondent, not as grounding upon it a plea of prescription, but as affording strong evidence against the truth of his case. I fully stated, on the argument at the hearing, the grounds upon which a party must almost always fail as to the fact, in making a court believe his statement, when he allows that he lay by for a long period of time during which there were other dealings. The authorities on the doctrine of the taciturnity of parties, if we may call it a legal doctrine, though it can

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hardly be said to be so, are to be found in Erskine's Institutes, the 7th title, and the 29th section of that title; and the reported cases on presumed payment entitle us to say that this doctrine of common sense, on which all juries in England act, with the approval of all judges, and which is, in truth, not a principle of law so much as one of natural reason applied to the weight of evidence, is fully recognized in the administration of the law of Scotland. Were this case sent back, and ultimately tried by a jury, who can doubt the result? But the account seems also against the party that makes the claim; for, including the sum for rent, and including the payment by Dr. Crawford, there is a balance of 5*l.* or 6*l.* against him, after allowing 27*l.* for the nine stirks. I therefore have no hesitation in recommending to your Lordships to affirm the interlocutors complained of, but of course, in a pauper case, without costs.

My Lords, the alteration I wish to suggest is, as I before stated, with respect to the mention of prescription. The Lord Ordinary, in the interlocutor of the 3d of March 1830, and which is appealed from, states,—  
 “ Having heard counsel for the parties, sustains the plea  
 “ of prescription:”—his Lordship certainly does give room to suspect that there had been generally a defence upon that plea, though I cannot find it as to the whole, though certainly with respect to part, the great bulk of it no doubt, it was pleaded: “ —sustains the plea of pre-  
 “ scription; assoilzies the defender from the conclusions  
 “ of the action, and decerns; and of consent of the de-  
 “ fender, finds no expenses due;” but the part relating to the prescription I should wish to have struck out, leaving it thus, “ assoilzies the defender.” Then, in the

interlocutor of their Lordships, of the 22d of June 1830, it is stated, "The Lords having heard this note, and heard " parties thereon, adhere to the Lord Ordinary's inter- " locutor reclaimed against, and refuse the reclaiming " petition, but remit to the Lord Ordinary to receive and " consider a reference to oath, if the pursuer shall be " disposed to make one," which he declined to do. Now, the alteration I should suggest is this, "adhere " to the Lord Ordinary's interlocutor reclaimed against " in so far as it assoilzies the defender." This will be all that is necessary. Part of the demand of the pursuer, the present appellant, was subject to be dealt with as coming within the law of prescription. To that part of the claim the plea of prescription was properly pleaded, and from that part of the demand the respondent was properly assoilzied upon the ground of prescription; as to the rest there is a doubt. It is by no means clear that the prescription was pleaded, and it appears to me by no means clear that it was a valid plea. Therefore as to that part, the 27l. for the stirks, though the defender, upon the other grounds stated, ought to be assoilzied, he should not be assoilzied upon the ground of prescription. All possibility of mistake as to the law of prescription, arising from the judgment below, will be prevented by directing it to be thus reformed. With this alteration, then, I shall move your Lordships that the interlocutors be affirmed.

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SYDNEY BELL, Solicitor.

[28th August 1833.]

No. 4. J. PATTISON junior (Blincow's Trustee), Appellant.—  
Solicitor General (Campbell)—Wilson.

A. ALLAN and COMPANY, Respondent.—Lord Advocate  
(Jeffrey)—Sandford.

*Bankruptcy* — Stat. 1696, c. 5.—1. A party who acceded to a composition contract on condition that all the creditors to a certain amount should also accede within a limited time, held (affirming the judgment of the Court of Session) not bound, the conditions not being complied with. 2. Issue sent to be tried by a jury, whether certain payments, and indorsations of bills, by a debtor, within sixty days of his bankruptcy, to a banker, were made in the ordinary course of trade.

*Process*.—1. Observations on the form of preparing records. 2. A supplementary action of reduction, having reference to a transaction falling under the act 1696, c. 5., but not libelling the act, and containing no reductive conclusions, dismissed as inept.

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Lords Newton  
and Moncreiff.

WILLIAM and Henry Blincow, silk merchants in Glasgow, were in the custom of doing business with Allan and Company, bankers in Edinburgh. In July 1825 the Blincows stopped payment, and offered a composition of 5s. in the pound, provided every creditor whose debt exceeded 20*l.* should agree to it within a month. Allan and Co. were creditors for 500*l.*, and acceded to the proposition; but it was alleged that the concurrence of all the other creditors had not been obtained, and

that the Blincows settled with them in the best way they could. On the 22d of August 1825 William Blincow applied to Allan and Company for the loan of 2,000*l.*, for which, as well as for the old debt of 500*l.*, he offered to grant a bond, with his two brothers, Valentine and Robert, as cautioners. To this request Allan and Co. agreed; and on the 28th of September a bond was executed for the loan of 2,000*l.*, and the prior debt of 500*l.*, payable by three instalments of 833*l.* 6*s.* 8*d.* each; the first being payable on the 4th of October 1826, the second on the 4th of April 1827, and the last on the 4th of October of the same year.

William Blincow thereafter began business as a silk merchant in Edinburgh, under the firm of William Blincow and Co., but of which he was the sole partner. He opened two accounts with Allan and Co., the one being relative to the bond, and the other an ordinary account current. On this latter account he operated by putting the cash and the bills which he received in the course of his trade into the hands of Allan and Co., (who gave him credit for the amount, less the discount of the bills,) and by drawing out money by cheques.

When the first instalment on the bond became due, on the 4th of October 1826, it was paid by a sum of 833*l.* 6*s.* 8*d.* being transferred from the account current to the bond account. Early in 1827 Allan and Co. having declined discounting Blincow's bills to the extent which he wished without a guarantee, his brother Valentine bound himself, on the 25th of February, to see them paid to the extent of 500*l.*

The second instalment fell due on the 4th of April 1826, but was not paid; and on the 25th of that month

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No. 4. Allan and Co. obtained from Blincow's two brothers an obligation "to pay you regularly any bills you may discount from this date for William Blincow and Co. that may be dishonoured, or only part paid by the acceptors of them, and all expenses that may be incurred." On the following day (being the 26th) Wm. Blincow drew upon Allan and Co. for 494*l.* 12*s.* 6*d.*; and a bill was returned dishonoured for 152*l.* 14*s.* These two sums (making 647*l.* 6*s.* 6*d.*) were put to his debit in the account current. On the 27th he indorsed bills to Allan and Co. to the amount of 1,001*l.* 15*s.*, which, after deducting discount, left a sum of 979*l.* 12*s.* 8*d.*, which was put to his credit in the account current. He again indorsed bills to them upon the 30th, so that upon that day there stood a balance in his favour of 811*l.* 14*s.* 9*d.* in the account current. On the 5th of May he transmitted to them from Aberdeen an order for 200*l.*, to be placed to his credit in the account current; and wrote to them that he should "feel obliged by your writing off the second instalment of my bond, due to you April the 4th, and debit my account current with the amount." This letter was received on the 7th; and on the same day a cheque for a sum equal to the instalment (being 833*l.* 6*s.* 8*d.*, and 45*l.* 8*s.* 4*d.* of interest) was presented to Allan and Co. by his brother Valentine, and the amount was transferred from the account current to the credit of the bond account. A balance still stood in Blincow's favour on the account current; and on the 12th of May he discounted bills with Allan and Co. to the extent of 221*l.* 4*s.* 8*d.*, and paid in cash 342*l.* 8*s.* 10*d.*, which, with an acceptance by him in favour of his brother Valentine for 155*l.*, and indorsed by the latter to Allan

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and Co., left at his credit 848*l.* On the same day Valentine presented a cheque by Wm. Blincow for a sum equal to the third instalment, being 833*l.* 6*s.* 8*d.*, and 5*l.* 6*s.* 8*d.* of interest; and at his request the amount was carried from the account current to the credit of the bond account, in liquidation of the instalment to become due on the 4th of October. On the 30th Wm. Blincow's estates, both in his individual and social name, were sequestrated under the bankrupt act, and the appellant Pattison was elected trustee.

An action of reduction was then brought by Pattison, first, of the bond to the extent of 375*l.* (being the difference between the old debt of 500*l.* and the composition), on the footing that Allan and Co. were bound by their accession to the composition arrangement; secondly, of the indorsation, by Wm. Blincow, of the bills and of the cheques granted by him between the 26th of April and the 7th of May 1827, whereby the second instalment had been paid, on the ground that they had been made and delivered within sixty days of the bankruptcy; and, thirdly, of the indorsations and cheque by Blincow, by which the last instalment had been paid.\* These two latter conclusions were rested upon the act 1696, c. 5.; but although it was alleged that the indorsations and cheques had been given by Blincow to defraud his other creditors, and bestow a preference on Allan and Co., yet there was no allegation that Allan and Co. were either participant in the fraud, or were aware that he was in bankrupt circumstances.

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\* In the summons the bill of 155*l.* accepted by Blincow in favour of his brother Valentine, and indorsed by him, was erroneously described as accepted by Valentine in favour of Blincow, and indorsed by him to the respondents.

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Allan and Co. pleaded in defence, 1. That the appellant had no title to object to the bond having been granted for the debt of 500*l.*, because the condition of the accession had not been complied with, and the whole arrangement had come to an end; and, 2. That as the bills had been indorsed to and discounted with them, and the cheques granted in the ordinary course of business as bankers, and as there was no allegation that these documents had been obtained for any fraudulent purpose, they did not fall under the act 1696; and at all events Allan and Co. were entitled to retain them in security and payment of the bond debt.

The Lord Ordinary (Newton) reported the case, and at the same time issued this note:—"The Lord Ordinary does not think the pursuer's claim for repetition of the 375*l.* well founded. The agreement by the defenders to accept of the composition was clearly conditional, and the condition having failed it was not binding upon them; they were therefore at liberty to include their full debt in the bond they afterwards took.

"The other question, arising from the payment of the second and third instalments of the bond, is attended with more difficulty, as these payments were in effect in a great measure made by the indorsation of bills, which were not payable for a considerable time afterwards. Had the defenders not been the bankrupt's ordinary bankers with whom he was in use to discount his bills, there would have been little doubt that the transaction, although in the form of a discounting of the bills, and an application of the proceeds, by order of the bankrupt, to the payment of his debt, would have been reducible, as falling under

“ the spirit of the act. It is said, however, by the  
 “ defenders, that being his ordinary bankers they dis-  
 “ counted the bills in question in the course of trade,  
 “ and only applied the balance which stood in his favour  
 “ on their running account to the payment of the  
 “ instalments of the bond, in consequence of his order to  
 “ that effect; that the pursuer has not averred on the  
 “ record that they were in the knowledge of the im-  
 “ pending bankruptcy, and is not entitled to assume in  
 “ argument that they acted on such knowledge.

“ It is not necessary, however, to the operation of  
 “ the act 1696, that the creditor shall be proved to  
 “ have been in the knowledge of the impending bank-  
 “ ruptcy, or guilty of fraud in accepting of the security.  
 “ It is enough if the debtor intends to favour him, and  
 “ to give him a preference over his other creditors.  
 “ Now it seems, from the circumstances, pretty obvious  
 “ that the debtor meant to give such a preference, if  
 “ not through favour to the defenders, at least through  
 “ favour to his own brothers, the cautioners in the bond;  
 “ and that one of them, Valentine Blincow, who per-  
 “ sonally managed the transaction as to the payment  
 “ of these instalments, was aware of his brother’s situa-  
 “ tion, and transacted the whole business for the pur-  
 “ pose of relieving himself and the other cautioner.  
 “ Indeed, if they were able to fulfil their engagement  
 “ under the bond, they had the real interest, and the  
 “ effect of the payment was to secure them a prefer-  
 “ ence. In such circumstances, and considering that  
 “ the third instalment of the bond was not payable for  
 “ some months afterwards, the Lord Ordinary thinks  
 “ it questionable if the transactions can be said to be  
 “ so clearly in the usual course of trade as to form an

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“ exception to the rule of the statute. He has there-  
 “ fore thought it proper to report the case, that the  
 “ opinion of the Court may be obtained.”

The Court (3d December 1828) pronounced this interlocutor:—“ Find that in the circumstances of the  
 “ case it was legal for the defenders, Alexander Allan  
 “ and Co., to take from William Blincow the bond  
 “ dated the 28th day of September 1825 years, com-  
 “ prehending therein the sum of 500*l.* sterling, being a  
 “ debt acknowledged to have been formerly due by  
 “ Henry Blincow; therefore sustain the same, and  
 “ assoilzie the defenders from the claim of 375*l.* sterling,  
 “ made relative thereto: Also find that the payment  
 “ on the 7th day of May 1827 of the sum of 833*l.* 6*s.* 8*d.*  
 “ sterling, and 45*l.* 8*s.* 4*d.* sterling of interest thereon,  
 “ made to account of the second instalment of the  
 “ foresaid bond, the same being part due from the 4th  
 “ day of April preceding, and in the way and manner  
 “ stated, was a legal and valid payment; therefore sus-  
 “ tain the same, and assoilzie the defenders from the  
 “ claim relative thereto, and decern: But, in the cir-  
 “ cumstances of the case, particularly the situation of  
 “ William Blincow, and the third instalment of the  
 “ bond not becoming due till the 4th day of October  
 “ 1827, find that the payment of 833*l.* 6*s.* 8*d.*, and  
 “ 5*l.* 6*s.* 8*d.* sterling of interest accruing thereon, made  
 “ on the 12th day of May 1827 years, by means of a  
 “ cheque or order, was not legal, and is to be con-  
 “ sidered as an evasion of the statute 1696; therefore  
 “ sustain the reasons of reduction quoad said payment,  
 “ and reduce and set aside the said cheque or order,  
 “ and find that the said sums are to be replaced to the  
 “ account current between the parties, in the same way

“ and manner as if the said order or cheque had never  
 “ been granted ; and decerned and declared accordingly :  
 “ Further find that the defenders, besides being com-  
 “ mon creditors by bond, were also the ordinary bankers  
 “ of William Blincow and Co. ; that they transacted  
 “ their business and discounted their bills in the ordinary  
 “ way of trade, and that such transactions do not fall  
 “ under the sanction of the statute 1696 ; and there-  
 “ fore assoilzie the defenders on that head, and decern ;  
 “ but find that they are bound to account to the  
 “ trustee for the creditors of William Blincow and Co.  
 “ for their intromissions in the ordinary way, reserving  
 “ the rights of the defenders as ordinary creditors, and  
 “ also the rights of all parties interested, as accords of  
 “ the law : And for ascertaining the whole of said  
 “ matters, remit to the Lord Ordinary to proceed and  
 “ do further in the case as to his Lordship shall seem  
 “ proper, reserving all questions of expenses until the  
 “ final issue of the cause.”\*

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When the case came before the Lord Ordinary the respondents maintained that they were entitled to retain the above sums referred to in the concluding part of the interlocutor, in satisfaction of the debt due to them ; and his Lordship, having doubts as to the meaning of part of the interlocutor, reported the case to the Court, with this note : — “ The Lord Ordinary is doubtful  
 “ whether that part of the interlocutor of the Court  
 “ which finds, ‘ that the defenders, besides being com-  
 “ ‘ mon creditors by bond, were also the ordinary  
 “ ‘ bankers of William Blincow and Co. ; that they  
 “ ‘ transacted their business and discounted their bills in

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\* 7 S. & D., 124.

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 1833. “ ‘ and therefore assoilzie the defenders under that  
 BLINCOW’S “ ‘ head, and decern,’ was meant to apply not only to  
 TRUSTEE “ the bills lodged in their hands previously to the 12th  
 v. “ of May 1827, when the cheque which has been re-  
 ALLAN & Co. “ duced was presented, and the bond delivered up, but  
 “ also to the cash and bills delivered to the defenders  
 “ by the bankrupt’s brother, Valentine Blincow, on that  
 “ day. If that cash and these particular bills are,  
 “ under the interlocutor, to be held as received in the  
 “ ordinary course of trade, and the only matter to be  
 “ determined under the remit be, whether the defenders  
 “ were or were not entitled to retain out of the balance  
 “ thus in their hands what was required for payment  
 “ of the third instalment of the bond, the Lord Ordinary  
 “ considers it to be quite clear that they were so en-  
 “ titled, and that the pursuers can take nothing by the  
 “ reduction of the cheque.

“ If, on the other hand, it is still open to him to consider  
 “ whether these particular funds were or were not  
 “ received in the ordinary course of trade, he is dis-  
 “ posed to think it presumable, from the whole circum-  
 “ stances of the case, that they were placed in the  
 “ defender’s hands, not in the ordinary course of trade,  
 “ but for the express purpose of being applied, through  
 “ the medium of the cheque, to the extinction of the  
 “ sum in the bond; and that unless this object had  
 “ been in view they would not have been received  
 “ at all.

“ But as the parties differ as to what they conceive  
 “ to have been the meaning of the Court in that part  
 “ of the interlocutor which is above quoted, and it

“ does not appear so clear in itself to the Lord Ordinary as to enable him to say which is right, he has thought it advisable to report the matter on cases.”

The Court thereupon (12th June 1829) “ remitted to the Lord Ordinary to inquire and decide whether the funds in the defender’s hands, against which the cheque for the amount of the third instalment of the bond was presented, were paid to the defenders in the fair and ordinary course of trade, or were deposited with the view and for the purpose of affording to them an undue preference over the other creditors of the bankrupt.”\*

The Lord Ordinary then remitted the case to the Jury Court; and an issue was sent for trial to a jury, “ Whether, in terms of the interlocutor of the First Division of the Court of Session, dated 12th June 1829, the funds against which the said cheque was presented were not paid to the defenders in the fair and ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of the said William Blincow and Co.?” The jury found, “ in respect of the matters proved before them, that the funds against which the cheque was presented were not paid to the defenders in the fair and ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of William Blincow and Co.”

At the trial it appeared that the funds against which the cheque was presented had arisen from indorsations

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\* 7 S. & D., 753.



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of bills, by William Blincow, only to the extent of 354*l.* 4*s.* 5*d.*, while the rest consisted of cash payments to the amount of 342*l.* 8*s.* 10*d.*, and an indorsation by Valentine Blincow of the bill drawn by him on and accepted by the bankrupt for 155*l.*

As the summons concluded only for reduction of indorsations of bills by Wm. Blincow, and for repetition of the contents of the bills so indorsed, (which it was thought could not apply to the bill indorsed by Valentine although both parties had hitherto acted on the footing that it was correctly described), the appellant raised a supplementary summons, setting forth the state of the original action, and the verdict of the jury, as establishing that the funds against which the last cheque was presented had been deposited in the respondents hands for the purpose of creating an undue preference; that, notwithstanding, the respondents intended to object to decree being pronounced against them, “ in “ respect the pursuer in his libel only concludes for “ delivery of bills indorsed to the defenders, or for pay- “ ment of their contents, but does not conclude for “ any sums of cash or money deposited by the bank- “ rupt in order to meet the cheques, by means of “ which the full payment of the second and third “ instalments of the bond was to be made to the “ defenders.” The appellant therefore concluded, that in addition to the conclusions of the foresaid action, and as supplementary thereto, it should be declared, “ that the pursuer was entitled to repetition of any “ funds paid into the defender’s hands within sixty “ days of the sequestration, and not in the fair and “ ordinary course of trade; that the funds against “ which the third cheque was presented had been so

“ paid in, and that the defenders should be decerned to repeat them.” He concluded also, that the actions should be conjoined; but there were no reductive conclusions, either on the act 1696 or otherwise.

In defence it was maintained :—1. That as the record had been closed in the original action, and it had been terminated by a verdict, no amendment of the libel was competent, and therefore the supplementary action could not be conjoined with it; 2. That neither could the latter be sustained as an independent action, for although the transaction was challengeable only on the act 1696, yet it did not libel on that act, and there was no reductive conclusion; and 3. That it was not competent in the original action to decern for repetition of payments in cash or bills not indorsed by the bankrupt.

In the original action, the Lord Ordinary (Moncreiff), pronounced this interlocutor :—“ Finds that  
 “ the funds against which the cheque was presented  
 “ were not paid to the defenders in the ordinary  
 “ course of trade, but were deposited with the view  
 “ and for the purpose of affording to the defenders  
 “ an undue preference over the other creditors of  
 “ William Blincow and Co.; that under the verdict,  
 “ as applied to the summons in this action, there are  
 “ termini liabiles for reducing the transaction by  
 “ which bills enumerated in the summons were indorsed  
 “ by William Blincow and Co. to the defenders, and  
 “ funds were thereby deposited in their hands, against  
 “ which the cheque in question was made and presented :  
 “ Finds it sufficiently ascertained that there were funds  
 “ in their hands, created by the indorsation of such  
 “ bills, to the amount of 354*l.* 4*s.* 5*d.*, and that the

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“ pursuer is entitled to decree of reduction, and for  
 “ payment to that amount; reduces, decerns, and  
 “ declares accordingly, and decerns for payment of the  
 “ said sums of 354*l.* 4*s.* 5*d.*, with interest, at the usual  
 “ rate then allowed by the banks, from and after the  
 “ 14th day of May 1827, the date of presenting the  
 “ cheque granted as the amount of the third instalment  
 “ of the bond, till the date of the execution of the  
 “ summons, and thereafter at the rate of five per cent.  
 “ till paid: But in respect that there is a difficulty  
 “ in applying the interlocutors of the Court, and the  
 “ verdict of the jury, to the conclusions of the sum-  
 “ mons in this action, so as to give any decree to a  
 “ greater extent, (which difficulty the pursuer has en-  
 “ deavoured to obviate by a supplementary action  
 “ raised after the issue in this cause had been tried, and  
 “ a verdict returned,) makes avizandum to the Court,  
 “ with this process quoad ultra, and appoints the parties  
 “ to lodge, print, and box short minutes of debate, ex-  
 “ plaining their several views as to this part of the cause.”

His Lordship added this note:—“ The Court, by  
 “ final interlocutors, sustained the defence as to the  
 “ second instalment of the bond, but reduced the  
 “ cheques drawn for the third instalment. But a ques-  
 “ tion remained as to the right of the defenders to  
 “ retain the funds in their hands, independent of the  
 “ cheque or the payment of it. Holding this to be a  
 “ separate case, the Court ordered an issue for trying  
 “ it; and the issue, in conformity to the interlocutor,  
 “ was so expressed as to apply to the whole funds  
 “ against which the cheque was drawn. The verdict  
 “ is in the same terms. After getting this verdict, the  
 “ pursuer, on looking into his summons, thought it

“ imperfect, or at least of doubtful effect. After the  
 “ cheque had been reduced, the question was, whether  
 “ the pursuer could also, under the act 1696, reduce  
 “ the transaction by which the funds were deposited,  
 “ so as to bar the plea of retention; and having this  
 “ in view, he had concluded in his summons for reduc-  
 “ tion of the indorsations of a great number of bills  
 “ particularly enumerated. It now turned out that  
 “ a considerable part of the funds in the hands of the  
 “ defenders had not arisen from the indorsations of  
 “ these bills by Blincow and Co., in so far as a sum  
 “ of 342*l.* 8*s.* 4*d.* had been paid to the defenders in  
 “ cash, and the last bill mentioned did not exist in the  
 “ form stated, though a bill of the same amount, ac-  
 “ cepted by Blincow and Co., and drawn by Valentine  
 “ Blincow, who was no partner of the company, but  
 “ one of the cautioners in the bond, had been indorsed  
 “ by him to the defenders. But the summons con-  
 “ tains no conclusions which can be applied to the  
 “ transaction by which the funds were deposited, other-  
 “ wise than as they were supposed to arise from the  
 “ indorsations of the bills particularly stated by Blin-  
 “ cow and Co. To supply this defect the pursuer  
 “ raised a supplementary action, and moved that it  
 “ should be conjoined with this action. The Lord  
 “ Ordinary has seen difficulty in conjoining a new  
 “ summons with an action which has already termi-  
 “ nated in a verdict, and also thinks it impossible to  
 “ make the summons in the original action effective  
 “ to the extent of the terms of the verdict, without  
 “ holding it to apply in a manner contrary to the ad-  
 “ mitted state of the fact. He has therefore thought  
 “ it advisable to give decree, as far as the summons

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“ clearly admits of, and quoad ultra to report the case, in  
 “ order that the Court may determine the effect of the  
 “ verdict. If the Court should find the difficulty in-  
 “ superable in this process, it will remain to be considered  
 “ how far the case can be extricated under the supple-  
 “ mentary action. There may be more doubt as to the  
 “ application of the original summons to the bill for 155*l.*  
 “ than as to the cash payment; but, there being  
 “ great difficulty in that also, the Lord Ordinary has  
 “ thought it necessary to leave the point open.”

In the supplementary action the Lord Ordinary at the same time ordered minutes of debate for the information of the Court as to the state of the cause, particularly as to the conjunction of the processes.

His Lordship added this note:—“ In a note to an  
 “ interlocutor of the same date in the original process,  
 “ the Lord Ordinary has adverted to the difficulties  
 “ arising from the form of the summons in the original  
 “ action, and the objection to conjoining them after  
 “ verdict. If this supplementary summons should be  
 “ considered entirely by itself, in so far as its object is  
 “ not attained by the previous summons, the Court  
 “ will then have to decide in what manner it ought to  
 “ be proceeded in. It may be a question, whether the  
 “ verdict in the other cause between the same parties  
 “ might be held by the Court as conclusive evidence,—  
 “ in point of fact, excluding the necessity of further  
 “ proof,—and whether they might then consider the case  
 “ of the money which was deposited in cash, and the bill  
 “ indorsed by Valentine Blincow, as making a case of law  
 “ to be judged of on the assumption of the finding of the  
 “ jury in point of fact. This may be attended with  
 “ difficulty. But supposing that difficulty to be overcome,

“ there would still be this separate difficulty in point of  
 “ form, that the supplementary action contains no re-  
 “ ductive conclusion ; and this being a challenge depend-  
 “ ing entirely on the act 1696, it may be impossible to  
 “ reach the act of paying or depositing the money within  
 “ the sixty days, without such a reductive conclusion.”

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Against the interlocutor in the original action the respondents reclaimed, stating that two of the bills falling under the first summons had been eventually dishonoured to the extent of 118*l.* 19*s.*, and that the decree by the Lord Ordinary for the sum of 354*l.* 4*s.* 5*d.* rested upon the erroneous supposition that these bills had been paid.

To this it was answered, that as the allegation that the bills had been dishonoured was not *res noviter veniens*, it could not now be competently stated.

The Court “ sustained the objection to the supplementary summons, that it contains no reductive conclusion, dismissed the same, and decern, reserving to the pursuer to bring a new action of reduction and repetition, if otherwise competent ;” but “ remitted to the Lord Ordinary to hear parties on the defender’s claim for deduction of the sum of 118*l.* 19*s.*, upon which they have not been heard before his Lordship ; quoad ultra adhered to the interlocutor reclaimed against, and refused the desire of the note, and decerned, and allowed decree to go out, and be extracted, ad interim, for the sum decerned and found due in the Lord Ordinary’s interlocutor, under deduction of the foresaid sum of 118*l.* 19*s.*, and corresponding interest ; reserving all questions of expenses incurred in the Court of Session.”\*

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\* 9 S. & D., 317.

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Under this remit the appellant proposed to resume the discussion as to the bill for 155*l.*, which was objected to by the respondents on the ground that the interlocutor exhausted the cause, except as to the 118*l.* 19*s.* The appellant answered, that no judgment had been pronounced by the Lord Ordinary in regard to the bill for 155*l.*; that the interlocutor of the Court did not decide the question as to it, and therefore it must be held as embraced in the remit. The Lord Ordinary assoilzied the respondents from the claim of 118*l.* 19*s.*; “ and, in respect that the interlocutor of the Court contains no remit as to any other matter, refused to allow any further discussion or investigation relative to the bill of 155*l.* mentioned in the summons and pleadings, as demanded by the pursuer; and the Lord Ordinary, considering the merits of the case to be exhausted by the interlocutor of the Court, and this judgment on the remit, and having heard parties procurators on the question of expenses reserved by all the interlocutors, makes avizandum.”

The appellant reclaimed, contending that the question relative to the 155*l.* bill remained still to be disposed of; and the Court (19th May 1831) remitted to the Lord Ordinary to hear parties in regard to it.\* Under this remit the Lord Ordinary found (1st June 1831), that the appellant was “ not entitled to repetition of the amount of the bill for 155*l.* as libelled in the present action; reserving his claim for said sum in any other action which he may be advised to raise,

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\* 9 S. & D., 599.

“ and to the defenders their objections thereto as  
“ accords.”

Pattison then appealed.

*Appellant.*—1. The respondents acted unlawfully in stipulating, as a consideration for their advancing the sum of 2,000*l.*, that the bankrupt should grant bond to them for the sum of 2,500*l.*, so as to include the old debt of 500*l.* due by the estate of William and Henry Blincow, and which the respondents had agreed to discharge on payment of a composition. The bond, therefore, ought to be reduced to the extent of 500*l.*, or at all events to the extent of 375*l.*, being the excess above the stipulated composition; and payment thereof having been obtained by the respondents from the estate of William Blincow and Co., who were not the proper debtors, the appellant, as trustee on that estate, is entitled to repetition for behoof of the creditors.\*

2. The second instalment of the bond having been past due when it was paid, on the 7th of May 1827 (which was within twenty-three days of the sequestration of William Blincow and Co.’s estate), and the indorsations of the bills, and the cheques presented against the proceeds thereof, being all made and granted within sixty days of the sequestration, by means of which the payment was accomplished, are reducible under the act 1696, as conferring an undue preference in securing payment to the respondents of their prior debt; and they are therefore

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\* *Junner v. Caddell*, 15th Feb. 1822, 1 S. & D. p. 325, new ed. 301; *Arrol v. Montgomery*, 24th Feb. 1826, 4 S. & D. p. 499, new ed. p. 504.



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liable to the appellant in repetition of the second instalment of the bond, and interest thereof.\*

3. It being now finally established by the verdict of the jury in regard to the third instalment, "that the funds against which the cheque was presented were not paid to the defenders in the fair and ordinary course of trade, but were deposited with the view and for the purpose of affording to the defenders an undue preference over the other creditors of William Blincow and Co's," the appellant was entitled to decree for repetition of the full amount of the undue preference; or at all events, if it should be held that the conclusions of the action are too limited to authorize decree being pronounced for any sums, except the contents of the bills libelled in the summons, this defect was remedied by the supplementary action, which ought to have been conjoined with the original one, after which decree should have been pronounced in the conjoined actions for the full amount of the third instalments.

The objection that the supplementary summons contains no reductive conclusion is unfounded, because the object of it was to supply an alleged defect in the original action by introducing a declaratory conclusion to have it found that the appellant was entitled to repetition from the respondents of any funds deposited in their hands by the bankrupt within sixty days of the sequestration, not in the fair and ordinary course of trade, but for the purpose of affording them an undue preference over the other creditors. Such a conclusion was proper, because the summons in the original action only concluded for repetition of funds created by the indorsation

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\* *Spier v. Dunlop*, 30th May 1827, 5 S. & D. 729. (new ed. 680.)

and discounting of bills; whereas it turned out that a part of the funds, by means of which the second and third instalments of the bond were provided for and paid within sixty days of bankruptcy, consisted of payments or deposits in cash made in order to replace part of the bill proceeds that had been applied to other purposes, —the substituted deposits being made in time to meet the cheques granted for the respective amounts of the two instalments. For this purpose no additional reductive conclusions were necessary in the supplementary action, those in the original action being sufficiently broad and extensive. Indeed the act 1696 contemplates the necessity only of a process of declarator of bankruptcy and repetition of the preference granted, more especially when it is accomplished not by means of formal deeds of alienation, but where, as in the present case, no deed or written contract exists which would fall to be reduced in order to pave the way for the claim of repetition of the amount of the undue preference.

Neither is there any foundation for the objection that the supplementary action cannot be conjoined with the original one, in respect the record had been closed, and proof led before the supplementary summons was raised. At all events, if it be incompetent to conjoin them the appellant is entitled to obtain decree in the supplementary action for payment of such sums paid to or deposited in cash by the bankrupt with the respondents, not reached by the first action, as have been or may be still shown to have been so deposited for the purpose of giving the respondents an undue preference over the other creditors of the bankrupt.

*Respondents.*—1. The summons, in so far as it con-

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cludes for reduction of the bond to the extent of 375*l.*, is not founded on the act 1696, c. 5., but on fraud at common law. The appellant assumes that the composition of five shillings per pound offered by William and Henry Blincow was, in so far as their creditors were concerned, unconditional; and then he deduces the plea in law, that by having acceded to the offer the missive which was subscribed by the mandatories of the respondents is binding on them until set aside by a process of reduction. But the offer which was made by William and Henry Blincow was coupled with this condition, "that every creditor whose debt exceeds 20*l.* shall accept the same within one month," and the appellant admits that all the creditors whose debts exceeded 20*l.* did not accept the offered composition within a month from the time when the offer was made; and therefore the plea by which it is alleged the respondents were bound by that offer is groundless. Besides, the appellant has no title to sue for repetition of the difference between the amount of the composition offered by William and Henry Blincow and the amount of that debt itself. He does not in any way represent the creditors of William and Henry Blincow; he is the trustee of the creditors of William Blincow alone, and their debts were contracted subsequently to the bond.

2. The payment of the second instalment of the bond is challenged exclusively as being contrary to the statute 1696. The bond is not alleged to be tainted with fraud, or to be anywise objectionable at common law; and the justice of the debt for which it was granted has never been disputed. But the respondents, besides being creditors to the amount of the bond by William

Blincow, were also his ordinary bankers, and transacted all his ordinary cash matters; and it is not alleged on the record that the bills presented by Blincow to the respondents were not truly discounted for his behoof in the ordinary course of trade, or that on the 7th of May 1827, when the second instalment of the bond was paid, the respondents had the slightest idea that Blincow was insolvent or in bankrupt circumstances.

If the act 1696 were to be held to apply to this case there is scarcely a transaction between bankers and their customers against which it would not strike. Where the debt is past due, if the payment be made by cash, or by means of drafts or indorsations of bills, without fraud or previous knowledge of impending bankruptcy, the act has been held not to apply; and, on the other hand, if the debt be merely contingent, as in a cautionary obligation, or if the creditor be not entitled at the time to demand payment, then, if in such circumstances money is impressed into his hands, it is not an extinction of the debt, but a provision in security of it, or a means of afterwards obtaining payment.\*

But the second instalment of the bond was past due on the 7th of May 1827, when an order on the account current was presented for the amount, and the debt to that extent discharged; and on the 14th there was a balance in Blincow's favour, in account with the respondents, of 848*l.* 0*s.* 11*d.* Now, it is the same thing whether the payment was by a draft or by means of

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\* Dickson, Langdale, and Co. v. Cowan, 7 S. & D., 132, Scales, 11th June 1829, 7 S. & D., 749.

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cash, for the one falls as much under the exception to the statute 1696 as the other.\*

3. The interlocutor of the Court, which found that the appellant could not under the conclusion of his summons obtain decret for the sum of 342*l.* 8*s.* 10*d.* which had been paid to the respondents in cash, and not by the indorsations of the bills libelled on, or from their proceeds, and that the defect in the original summons could not be remedied by conjoining the supplementary action, is well founded. To have given decree against the respondents under the first summons for repetition of payments received by them in cash would have been *ultra petita*, and contrary to the grounds in law and fact on which the appellant's case was laid.

Neither was this made competent by the supplementary action, because as a proof had been led and concluded, and judgment pronounced in part disposing of the cause, it could not be conjoined with the original action. It is equally unavailing as a separate and distinct action, because the written evidence of the payments made in cash by Blincow into his account current is not called for, and no payment of money exceeding in amount 100*l.* Scots can be proved otherwise than by written evidence. Besides, the statute 1696 is not libelled on, as the law which alone confers on the appellant any title and interest to sue for the reduction of the alleged payments by Blincow to the respondents. And, lastly, the summons contains

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\* *Jamieson v. Ferrier*, 23d Jan. 1810, Bell, vol. ii. pp. 217, 219; *Watson v. Young*, 1st March 1826, 4 S. D. p. 507. new ed. 515; *Ferrier v. Newton*, 2d June 1808, F. C.; *Stewart v. Sir Wm. Forbes and Co.*, 1st March 1791, Mor. 1142.

no conclusion even for declarator of the bankruptcy of William Blincow, nor any conclusion for reducing the payments in cash made by him within sixty days of his bankruptcy to the respondents as in violation of the statute 1696.

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LORD CHANCELLOR.—My Lords, this was an action brought by the trustee under the sequestration of Messrs. William Blincow and Company, and of William Blincow, a partner in that house, against Messrs. Alexander Allan and Company, bankers in Edinburgh, and the individual partners in that house, the principal object of which action was to obtain repayment of certain sums which had been paid, as it was alleged, by the bankrupts, in contemplation of bankruptcy, out of the usual course of business, and for the purpose of giving a preference to one creditor over others. There was a supplementary suit; and the three points which are chiefly for the consideration of your Lordships, raised at the bar, are, first, the sum of 500*l.* which was claimed to be repaid in the action, but from which claim the Court assoilzied the defender,—that 500*l.* being the first instalment upon a bond of 2,500*l.* granted by Blincow to Messrs. Allan, or at least 375*l.*, part of that 500*l.*; the 500*l.* having been an old debt of William and Henry Blincow to the firm of Allan and Company, and that 500*l.* having been included in the sum for which the bond was given. Under the circumstances which I have already alluded to, the Court below assoilzied the defender from this conclusion of the summons, and in my opinion, justly and well decided in so assoilzieing him. The condition of the offer of composition was, that every creditor whose debt exceeded 20*l.* should

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come in and accede to that composition within the period of one month,—a most important condition, and not an unusual condition in such arrangements for composition. But it is clear that no such thing was done,—that, in the language of the Scotch law, the condition was never so purified,—that the obligation had never attached, which was the matter of condition. It is clear that all the creditors, or any thing like all the creditors, to the amount of 20*l.* and upwards, did not come in within a month,—did not come in within the time for which the bond was given; that is not only clear from the figures in the case, but is in truth expressly admitted by the appellant, in the course of the proceedings in the cause. It is therefore clear that the parties were not under restriction, and that they were entitled to include, on the one side, that debt of 500*l.*, being an old debt. My Lords, I may further observe, that the whole question, although in a case not without difficulty on various points, was very fully considered, and elaborately discussed, with his usual acuteness and discrimination, by a learned Judge, whose loss the Court of Session has now to deplore—I mean Lord Newton; and notwithstanding there were some matters on which a difference of opinion existed between that learned Judge and the Division before whom the case was discussed at various times, yet no difference appears to have existed between that learned Judge and the Court below which pronounced the interlocutor. I have therefore no hesitation whatever in advising your Lordships, on the ground I have shortly stated, to affirm that part of the interlocutor complained of.

We now come, therefore, to the next point, which refers to the repayment of the second instalment on

the bond of 2,500*l.*—an instalment of 833*l.* 6*s.* 8*d.* principal, together with 45*l.* 8*s.* 4*d.* for interest, being the second separate instalment; for the third is now out of the question, at least as far as regards the repayment,—the Court, having held that that was clearly in contemplation of bankruptcy, and by way of giving preference to a creditor, and that it was out of the ordinary course of business, and therefore decreed repetition—a repayment of that third instalment,—and from this decree no appeal has been prosecuted. The only question then remaining is that which relates to the second instalment of 833*l.* 6*s.* 8*d.* For disposing of this question it will be necessary to go a little into the pleadings in this case, because it is very much upon the frame of these pleadings that a difference of opinion arises between myself and the Court below, in respect of these matters; and upon which point I am about to recommend to your Lordships to reverse this part of the interlocutor, and to remit, with directions to the Court below. The third head of the revised condescendence sets forth the allegations of the pursuers with respect to this sum,—that it was “ in the knowledge of the insol-  
 “ vency, and in contemplation of the impending public  
 “ bankruptcy and sequestration of the estates of the said  
 “ William Blincow and Company, and William Blin-  
 “ cow, that they made and granted to and in favour of  
 “ the defenders, in security, and in the view of giving  
 “ them a preference for payment of their said prior debt,  
 “ by help of the cheques after mentioned, indorsations  
 “ by the social firm of William Blincow and Company,  
 “ to the eighteen bills first enumerated in the summons,  
 “ amounting to the sum of 1,001*l.* 15*s.*; and thereafter,  
 “ on the 30th day of the same month, William Blincow

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No. 4. “ did also, with the same view, grant indorsations in the  
 28th August “ said social firm to the eight bills therein next  
 1833. “ enumerated, amounting to the sum of 276*l.* 2*s.* 9*d.* ;  
 BLINCOW’S “ and lastly, with the same view, he granted indorsations  
 TRUSTEE “ in favour of the defenders to the four bills last therein  
 “. “ enumerated.” It thus states in the next head, which  
 ALLAN & Co. is the fourth, that William Blincow did, on the 7th of  
 May 1827, within twenty-three days of the bankruptcy,  
 make and grant two cheques, addressed to the defenders,  
 and subscribed by him, under the social firm of William  
 Blincow and Company, for 833*l.* 6*s.* 8*d.* and 45*l.* 6*s.* 8*d.*  
 Then it is stated in the sixth head, and pleaded directly,  
 “ that the indorsations of the said thirty bills, the three  
 “ cheques for the apparent proceeds of the bills, were  
 “ made and granted by William Blincow, in order to  
 “ secure to the defenders a preference, out of the proper  
 “ estate of William Blincow and Company, for pay-  
 “ ment of their prior debt; and that before receiving  
 “ the indorsations, and crediting the bankrupts with the  
 “ proceeds of the bills, and thereafter giving up the  
 “ 2,500*l.* in exchange for the pretended cheques, the  
 “ defenders stipulated for and received an obligation  
 “ from the cautioners in the bond, guaranteeing pay-  
 “ ment of all the bills so indorsed to them by the  
 “ bankrupts; in consequence of which obligation,  
 “ Valentine Blincow has since been called upon, and  
 “ has paid some of the bills which were not retired  
 “ when due.” Now, here were allegations of the utmost  
 importance to the point raised, upon the first part of  
 the pleadings—I mean that which is both pleaded and  
 raised in the summons, and which sets forth, or  
 ought to be set forth, distinctly, the ground of objection  
 —the impending bankruptcy—the knowledge of the

bankruptcy—the subsisting insolvency—the whole of the proceedings out of the ordinary course of business—the giving the preference to one creditor, or one body of creditors, over the others. On the other side, by the defender, these allegations are met by counter allegations. And my first observation upon this part of the pleadings is, that in the answers to the condescence, instead of directly stating what averments in the condescence the defenders deny, and what they admit, they state, first, it is true, generally,—that they admit so much; but then, with respect to all that is most material,—I mean the third and subsequent heads of this division of the condescence, those averments which I have mentioned as most material, and have read in substance to your Lordships,—as to all those, there is no distinct statement, in the answers, of what the defenders admit, and what they deny, of these material averments. On the contrary, they state, “The remaining articles of the condescence are denied, in so far as they are inconsistent with the following statement;” and then comes a statement nearly as long as the statement in the condescence. Now, it is quite clear, that there cannot, by possibility, be a more inconvenient mode of proceeding than this. I will assume, for the present, that it is conceded that the pleadings should contain, not merely the averments of the fact, without the evidence, leaving the party afterwards to bring forward his evidence to prove that fact. I will assume, for the present, that it is a fit and proper mode that you should first set forth the facts you intend to rely upon, either as the ground of your claim, or as the ground of your defence; and that you should afterwards set forth all the evidence, by way of separate averment,

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—all the evidence whereby you intend to prove the facts you aver—whereby you propose to support your averment. I will assume, for the present, that this is a fit and proper mode of pleading,—not that any good pleader ever could think so, and not that I ever thought so; but because it is the inveterate practice of Scotch pleading, and because it is the mode in which pleading is carried on in Scotland. I assume, therefore, that it is the right method, and that it is fit to plead all the evidence, as well as all the facts. Yet still, I say, that a more inconvenient mode of pleading the evidence, and setting forth the statement of the evidence, cannot be well imagined, than the mode in this case followed; for what is the consequence? Instead of a clear issue being raised upon each matter that is pleaded, the affirmative of the one party being met by the negative of the other, so that the Court shall be under no difficulty in at once apprehending what the matter in dispute between the parties is, and what is the matter which the Court has to try, or put in a course of trial,—instead of that, it is necessary for the Court to compare the two statements together, and then to find out how far they are inconsistent; and having ascertained that they are in some points of view inconsistent, and in what points they are inconsistent, the Court is left, in fact, to frame an issue for itself, and to say—“ The pursuer says so and so; “ but the defender, without denying it, says so and so; “ and in so far as what the defender says is different “ from, and inconsistent with, what the pursuer says, “ in so far it is to be held that the matter is in dispute, “ —and thereupon must be the issue between the par- “ ties, and thereupon must be the conflict.” That is not what the Court ought to be called upon to do,—the

pleadings ought to raise the issue,—the pleadings ought not to leave a doubt in the mind of those who read them that there is an affirmative allegation on the one side, and a negative allegation on the other; which would show the Court that is to try it, or send it to be tried, what is the question which is to be decided between the parties. It is perfectly clear, that in going through the whole of the facts which are meant to be set forth, (whether a general fact is intended to be proved, or the facts wherein it is meant to be said consists the proof of that general fact, or even joining both together,) some such course as this which I am about to state ought to be adopted, and not such a course as that which I complain is now adopted. First, the defender, going through the pursuer's statement of facts, one after the other, ought distinctly and clearly, upon each, to say "admitted," or "denied." If "admitted," there is an end of the question: if "denied," then it may be either a general or an entire denial, or it may be a qualified denial. If it is a general denial, the issue is at once raised—the affirmative is met by a negative: if it is a qualified denial, then the qualification must be stated. To the denial must be added the circumstances admitted, which form the exceptions to the denial, and then deducting, as it were, that which is excepted from the denial, it will distinctly appear what is left in issue between the parties. Then if, after going through the whole of the pursuer's statement in this fashion, the defender still finds that there is any thing to add beyond the mere meeting of his antagonist's averments, as in the mode of pleading now adopted, it is fit he should add that statement of his own. Such a mode of pleading keeps every thing distinct. You see all that

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is admitted on the one hand, and all that is denied on the other, and you are not left to calculate and to guess; for the statements being involved, as they are here, you are almost left to conjecture what the real points of difference in matters of fact are between the parties.

However, although this mode of pleading, which has been here adopted, is by no means unusual in a condescendence in Scotland, and although it is subject to the remark I have now made, one thing is perfectly clear, that with a little trouble, and by comparing the two statements the one with the other, you do find that there are most important averments on the one side, not within the admissions on the other, but coming within the description of being a denial of the pursuer's statement "so far as they are inconsistent with the following statement,"—though there are matters in "the following statement" inconsistent with the pursuer's statement, in direct opposition to it, and which do raise a direct issue of fact. Thus, to go no farther than the last subdivision of that third head, "It is denied," says the defender in his answer, "that the bills were discounted by the defenders, except in the usual course of business. It is denied that the indorsations were made with the view of granting them an undue preference in security." Now, "the usual course of business," and the "undue preference," are of the utmost possible importance, in point of fact, to the decision of the whole question between the parties, as to the second instalment. The one party says it was not in the usual course of business, and the other says it was in the usual course of business;—the one says it was with a view to giving an undue preference; the other party says it was without the view of giving such a preference.

Here, therefore, upon these two averments, there is a distinct and direct conflict between the parties. Then, the defender having denied with more or less clearness, but still substantially having denied these matters, which are more or less clearly, but still substantially averred, he thinks it necessary to add a denial of that which I cannot find to have been averred at all in the pleadings, and which, if it had been averred, I incline to think with the Court below, in point of law, would have been an irrelevant averment. He denies “that the cheques were received by the defenders, in the knowledge of the bankrupts insolvency.” I can find no averment—I may be mistaken—but I can find no averment throughout the condescence, of the cognizance of the defenders, Messrs. Allan, of the insolvency of the parties at the time they received the cheques; and I incline to the opinion stated in the Court below, that it is not necessary that you should prove it was within the knowledge of the party receiving those cheques which were so paid. However, so it stands upon the condescence and answers.

Then come the pleas in law, which are stated by both sides; and if I have had much to observe upon the mode of pleading which has been adopted in the former stage—namely, that stage of which the peculiar province is to raise the issue of fact between the parties—I own I feel that I have still more right to observe upon the mode of pleading adopted in the second stage—namely, that which is to raise the issues in law between the parties. These pleas in law, as I understand, ought to consist of mere allegations of matters of law, and ought not to be mixed up with averments of matters of fact. Now, your Lordships will

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find, on both sides, such a mixture in this case of both, as makes it hardly possible for the Court to deal with the matters of law; because it is entirely indistinct, whether the parties mean to rely upon the averment of the matter of fact or not. There is an averment of fact on the one side, met with a denial on the other unico contextu, and mixed with the pleading upon matters of law. Thus, under the third head of the pleas in law for the pursuer, the pursuer sets forth, that “the indorsations of the bills libelled, and the cheques granted by the bankrupts, on or about the 7th and 12th May 1827, within sixty days of the sequestration, for the amount of the second and third instalments of the 2,500*l.* bond, are reducible, and fall to be reduced, under the act of 1696, as being an indirect mode, out of the common course of business, of giving the defenders an undue preference to secure payment of the debt due to them on the said bond.” Undoubtedly it may be said, that this assumes, in order to apply the act of 1696, that the payment was out of the common course of business, for the purpose of giving an undue preference. It may be said, no doubt, that this is the pursuer’s statement merely of a plea in law, or a conclusion of law, which he intends to raise, upon the assumption that he is correct in his averment of fact—that taking his averment of fact to be accurate, that conclusion in law would follow. Then, how is this met by the defender? He does not meet that plea by a denial;—he does not say, admitting the fact to be as you have averred, your conclusion, in point of law, would not follow; but he gives his own conclusion of law from the facts he himself states; and as the pursuer raises his own conclusion from his mode of stating the facts, so the

defender raises his own conclusion from his mode of stating the facts. But if it should be remarked, that there is a sufficient justification of this mode of pleading adopted, there is one course that this does not enable the parties or the Court to adopt at all. Suppose the defender were to admit the facts as stated by the pursuer, (he denies them—but supposing he admitted the facts, or some of the facts, as stated by the pursuer,) it would not by any means follow that he might not deny his law;—that would be what we call demurring. He might say, admitting your proposition of fact, your conclusion of law does not follow, but an opposite conclusion, or a different conclusion of law follows. But here each takes his own view of the facts, and each raises his own inference of law from his own peculiar view of the facts; for the defender says, “the indorsations upon the bills sought to be reduced were granted in the course of trade for bonâ fide consideration,—the bills being regularly discounted, and the proceeds entered to the credit of William Blincow and Company in the account current kept between them and the defenders. The cheques specially mentioned were presented to the defenders in the usual course of business, and immediately entered to the debit of the parties cash account.” Now, in no mode whatever of viewing the subject, and upon no principle of pleading whatever, even admitting that the ground of defence, and the mode of pleading I have adverted to, might be taken to be and were a sound one,—allowing it to be sufficient that each party pleaded the law as he deemed it to arise upon his own view of the facts,—on no such ground, and by no such admission, can I justify this averment; for this is not an averment

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No. 4. in law at all,—it is a separate and distinct averment of  
 28th August fact. “ The cheques specially mentioned were presented  
 1833. “ to the defenders in the usual course of business, and  
 BLINCOW’S “ immediately entered to the debit of the parties cash  
 TRUSTEE “ account;” and that is not made a plea in law, which  
 v. “ is a mere allegation of fact, by adding, as they have  
 ALLAN & Co. done, “ Bell, vol. i. p. 212, Cases referred to; vol. ii.  
 “ p. 123 and 124,” &c. I will answer for it, that in  
 no page or volume of Mr. Bell will there be found an  
 authority for this statement, that the cheques specially  
 mentioned, and paid, and indorsed, by Messrs. Blin-  
 cow to Messrs. Allan, were presented to Messrs. Allan  
 in the usual course of business, and were immediately  
 entered in the books of Messrs. Allan to the debit of  
 the cash account of Messrs. Blincow. I will venture  
 to say, there is not a word of either Allan or Blin-  
 cow, or their cash account, to be found in either  
 volume first or volume second of Mr. Bell’s work.  
 So that all this statement must apply to the pre-  
 ceding averment of fact, and not to the inference of law  
 intended to be raised upon that statement. Now, let us  
 see what that inference of law is: “ The indorsations  
 “ upon the bills sought to be reduced were granted in  
 “ the course of trade, for bonâ fide considerations” —  
 there is no authority for that in Mr. Bell, for that is  
 matter of fact referring to the particular transactions be-  
 tween the Blincows and the Allans,—“ the bills being  
 “ regularly discounted, and the proceeds entered to the  
 “ credit of William Blincow and Company, in the ac-  
 “ count current kept between them and the defenders.  
 “ The cheques specially mentioned, were presented to  
 “ the defenders in the usual course of business, and  
 “ immediately entered to the debit of the parties cash

“ account.” That is all the rest of the third head of the pleas in law; and for that which is a pure statement of fact, from beginning to end, without a word of law in it—without any thing that can lead any body who reads it, to know what law is intended to be raised upon those facts—that is stated as the defenders third plea in law; and to give some colour to it, as matter of law, reference is made to Mr. Bell’s work, and other text writers. Therefore it is quite clear, in no manner in which this can be viewed, can it be considered a matter of law.

Now, my Lords, this is not only an observation upon such an incorrect manner of pleading, and which may be made more generally than necessary upon the pleadings in this case, but it goes very far to show into how entangled a situation the present question has been got; for I do maintain, that throughout there has been no due separation of the matters of law and of fact, and that the Court has had to give its judgment, in various stages of this case, without ever having the law separated from the fact, and consequently without having the facts ascertained. The facts are not admitted, they are disputed between the parties to this hour. The Court has proceeded upon a complicated view of the subject, and must have assumed, and gratuitously assumed, the facts to have been as stated in one way or the other, or they could never have come to a decision upon the matter in dispute. I do not mean to say that the Court has not the power of deciding without a jury, but I cannot help lamenting, that when they were sending one issue to be tried on one part of the case, which was most properly sent, and most properly tried, I cannot but greatly regret that they did not send an issue between the parties as to

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the facts so material for disposing of the question touching the second instalment; namely, the undue preference, the transaction being in the ordinary course of dealing, and also the party's knowledge of the insolvent state of the bankrupts.

I have stated, that Lord Newton, with his usual discrimination, dealt with the parts of the case before him in the various stages through which it went. I will now call the attention of your Lordships to a very able note of that learned Judge, annexed to his interlocutor of the 12th November 1828, and this will illustrate the inconvenience of this mode of pleading. This was, of course, after the defences had been lodged, and the pleas in law and condescendences upon the facts had been closed. “ It is said, however, by the defenders, that being his ordinary bankers, they discounted the bills in question in the course of trade, and only applied the balance which stood in his favour on their running account to the payment of the instalments of the bond, in consequence of his order to that effect; that the pursuer has not averred in the record, that they were in the knowledge of the impending bankruptcy,”—I have already stated to your Lordships, that I can find no such averment of fact—“ and is not entitled to assume an argument, that they acted on such knowledge.” Then his Lordship goes on,—“ It is not necessary, however, to the operation of the act of 1696, that the creditor shall be proved to have been in the knowledge of the impending bankruptcy, or guilty of fraud, in accepting of the security. It is enough if the debtor intends to favour him, and to give a preference over his other creditors. Now it seems,” says his Lordship, “ from the circumstances,

“ pretty obvious, that the debtor meant to give such a preference, if not through favour to the defenders, at least through favour to his own brothers.” Now this may be true, no doubt; but so far from being admitted, he does not say it is admitted; he says, “ it seems pretty obvious.” But so far from its being proved to be true, it is one of the subjects of denial of the defenders; it is denied, though undoubtedly it is asserted on the other side. “ It is denied that the indorsations were made with the view of granting them an undue preference in security.”—“ Indeed” says his Lordship, “ if they were able to fulfil their engagement under the bond, they had the real interest; and the effect of the payment was to secure them a preference. In such circumstances, and considering that the third instalment of the bond was not payable for some months afterwards, the Lord Ordinary thinks it questionable if the transactions can be said to be so clearly in the usual course of trade as to form an exception to the rule of the statute;” and for that reason, your Lordships see he reported the case to the Court. It is quite clear that Lord Newton states what the inclination of his own mind was upon the fact, but that he was stopped from coming to a decision by the state of the pleadings, and by there being no settlement of that disputed point of fact. On these issues of fact and pleas in law, the parties then proceeded to the First Division, and the First Division pronounced the interlocutor first appealed from. I need not trouble your Lordships by referring to the first branch of that interlocutor, with respect to the 500*l.* or the 375*l.*, which I have suggested you ought to affirm; but the next relates to the instalment in question; and they sustain the

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No. 4. defence,—they hold it to be a legal and valid defence,  
 28th August “ and assoilzie the defenders from the claim relative  
 1833. “ thereto, and decern ;” and then, with respect to the  
 BLINCOW'S third instalment, they find it was not legal ; and that, as I  
 TRUSTEE have stated to your Lordships, is not now denied. Great  
 v. doubt appears to have been entertained when the cause  
 ALLAN & Co. was remitted, upon the third or last branch of the inter-  
 locutor, to the Lord Ordinary, as to what the precise  
 meaning of the remit was ; and as the parties differed,  
 he thought it fit to report the matter upon cases, to  
 enable him to decide, without going back to the Court,  
 which of the parties was right in the construction put  
 upon the meaning of the remit. Then, my Lords, the  
 matter is sent back upon the remit, with a direction  
 which leads the Lord Ordinary to send an issue to be  
 tried,—that issue was tried ; and upon the finding of the  
 jury, first the Lord Ordinary pronounced a very able  
 interlocutor on the 18th December 1830, to which are  
 appended certain observations of great importance,  
 and with the greatest part of which I entirely coincide ;  
 and that brings the matter again as to the branch  
 of it that was in question before the jury before  
 the Court, upon which they proceed to pronounce the  
 second interlocutor appealed from, and then a further  
 proceeding is rendered necessary by that interlocutor  
 before the Lord Ordinary. And taking all those inter-  
 locutors together, the first, second, and third, and that  
 of the Lord Ordinary, both as regards the question of  
 costs and the other matters, (but which question of costs  
 he appears to have decided with very great distinctness,  
 and with his usual ability, in a manner with which I am  
 perfectly satisfied,) I should therefore move your Lord-  
 ships to affirm all these. But the part which I con-

ceive cannot stand, is that finding with respect to the second instalment; and I shall therefore move your Lordships, after affirming the other interlocutors, (the last and the first interlocutors,) to reverse that declaration in the second interlocutor, and to remit to the Court, with directions to have an issue tried upon the second instalment; that issue being raised with more or less distinctness by the pleadings, and that issue substantially being, Whether or not payment was made in the way alleged by the pursuer, or in the way alleged by the defenders? If it is in the way alleged by the pursuer, there shall be a repetition of it, it being reducible under the act of 1696. If it be in the way alleged by the defenders, then it shall stand according to the second finding of the first interlocutor. But in all other respects, except in so far as any other part of these interlocutors may be liable to be varied to make them consistent with this, that they shall be affirmed.

This brings me, my Lords, to the third and last head to which I have to call your attention, and that is, the question connected with the supplemental suit. I am of opinion, in the first place, that the Court below was right, for the reasons assigned by the Lord Ordinary, in not conjoining the two actions. I am, in the next place, of opinion, though that appears to have been held doubtful by the learned Judge to whom I have referred, that the verdict in the first action is evidence between the parties to the supplemental suit,—it is a verdict between the same parties, and in truth, upon the same subject matters;—it therefore is evidence, and might have been used in the second suit. But, thirdly,

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I am of opinion that the second suit (the supplementary suit) is deficient in the necessary reductive conclusions—that there are not the necessary reductive conclusions in the libel and summons,—and that the want of these is not supplied by the words at the bottom of folio two, and at the top of folio three, of the appellant's case, “in addition to the conclusions in the foresaid “action;” and therefore those reductive conclusions being necessary, and not being found in this case, their Lordships did well in pronouncing the interlocutor in the supplemental suit, which is now the subject of appeal. In both, therefore, of these appeals, what I shall recommend to your Lordships to do is this,—to affirm the interlocutors complained of in all respects, except in so far as regards the second finding of the first interlocutor complained of, and touching that, to remit to their Lordships, with directions to have an issue tried upon the interlocutor in question.

The House of Lords, in the appeal of the original action, pronounced this judgment:—

It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed, except in so far as regards the second finding of the first interlocutor of the Court of the 3d December 1828 touching the second instalment: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland with directions to have an issue or issues tried upon the legality and validity of the payment of the said second instalment.

In the appeal of the supplementary action their Lordships pronounced this judgment:—

THE HOUSE OF LORDS.

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It is ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

ANDREW M<sup>c</sup>CRAE—MONCREIFF, WEBSTER, and  
THOMSON, Solicitors.

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No. 5. Colonel GORDON, Appellant.—*Lord Advocate (Jeffrey)*  
—*Dr. Lushington.*

GAVIN GIBB DUNN, and others, Respondents.—*Solicitor*  
*General (Campbell)*—*Robertson.*

*Teinds.*—The titular of the teinds of a parish entered into a submission with an heritor to ascertain the value of his teinds, and a decret arbitral was pronounced valuing the teinds, but the minister was no party : Held (affirming the judgment of the Court of Session), that the heritor could not obtain a judicial approbation of that decret, whereby the rights of the minister would be affected.

2<sup>D</sup> DIVISION.  
Lord Moncreiff. **I**N 1759 the College of Aberdeen, titulars of the teinds of the lands of Slains and Furvie, entered into a submission (to which the minister was no party) with the then proprietor, Lord Errol, regarding the yearly amount of parsonage and vicarage teind payable by the latter. This was determined by decret arbitral in 1760, which contained the following clauses :—“ Excepting always the stipend to the minister, which I find ought to be paid at the terms and “ delivered at the places appointed in the decret of “ modification and locality of the said parishes of Slains “ and Furvie, or otherways ascertained by use and “ wont.” “ But as it appears that there is payable out “ of the said James Earl of Errol’s lands, within the “ said titularity, yearly, to the minister of Slains and

“ Furvie, twenty-seven bolls bear, which exceeds the  
 “ teind bear as aforesaid in six bolls one firloft and  
 “ three fifths of a peck, and notwithstanding thereof  
 “ the said James Earl of Errol has been in the use of  
 “ payment of the said twenty-seven bolls of bear to the  
 “ said minister, but in respect the whole teind is  
 “ hereby decerned to be paid and delivered to the  
 “ titulars, with the exception above mentioned, I farther  
 “ ordain the said titulars to free and relieve the said  
 “ James Earl of Errol and his foresaids of the said six  
 “ bolls one firloft and three fifths of a peck of bear in  
 “ all time coming.”

Part of these lands now belonged to the appellant. In 1802 a decree of valuation of the teinds of his lands was pronounced, reserving all prior valuations or decrees; and in a process of augmentation brought by the minister in 1809, this valuation was founded on. Thereafter, the College, as titulars, brought against Colonel Gordon, but not against the minister, a reduction of the decret arbitral, and concluding for payment or accounting according to the valuation of 1802; but he was assoilzied.

In 1829 the respondent, as minister of the parish, brought a summons of augmentation, modification, and locality, in which Colonel Gordon appeared, and pleaded that the valuation by the decret arbitral in 1760 was a valid and regular proceeding, and effectual against the minister and all concerned, and that it had not been abandoned by the process of valuation in 1802, which was brought in ignorance of the prior award; and besides the decree bears an express reservation of all former valuations, and therefore he was not barred or

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excluded from founding on the decret arbitral.\* To this it was answered, that the decret arbitral could have no force against the minister of the parish, as he had not been in any respect made a party to the submission ; and the process of valuation in 1802 afforded conclusive proof that the proceedings in 1760 were regarded as of no force against the minister.

Meanwhile, Colonel Gordon brought in 1830 a summons of approbation of the decret arbitral calling the Colledge, the Minister, and the Crown.

In this action “ the Lord Ordinary (20th December 1831) having considered the closed record, and heard parties procurators thereon, and advised the whole process in this action of approbation, sustains the defences, assolizies the defenders, and decerns ; finds expenses due, and remits the account, when lodged, to the auditor, to be taxed.

“ *Note.*—The Lord Ordinary holds these points to be settled :—1. That in a process of valuation before the high commission the minister of the parish must be called in order to make the decret binding on his successors. (Forbes, 399, 401 ; 2 Ersk. 10, 35 ; Minister of Kirkbean, February 4, 1708.) 2. That in a process of approbation of a sub-valuation the rule is the same. (Lord Salton v. Cook, May 22, 1827, F. C. ; Minister of Speymouth and Duke of Gordon, December 2, 1823.) 3. That where the

\* Ersk. b. ii. tit. 10. sec. 27, 28, 29, 34 ; Act 1633, c. 19 ; M'Neill v. Minister of Campbelltown, 3d June 1801, Mor. No 12, Apx. Teinds ; Sir George Mackenzie's Observations on Statute 1633 ; Connell on Tithes, 2d edit. vol. i. p. 210 ; Forbes, p. 402 ; Case of Robertson in 1734 (1 Connell, 329, 1st ed.) ; Lockhart v. Duke of Hamilton, 20th Nov. 1793 (ib. 331) ; Hamilton v. Colbrook, 30th Nov. 1803 (ib. 332) ; Case of Hamilton, 1820.

“ benefice was a parsonage, and the minister, of course,  
 “ titular, a report of valuation by the sub-commissioners  
 “ cannot be approved of, unless it appears that it was  
 “ made in a process under the old statutes or commis-  
 “ sion, to which the minister was called as a party.  
 “ (Ferguson v. Gillespie (Arrochar), February 4, 1795,  
 “ affirmed February 15, 1797.) 4. That where the  
 “ minister was a stipendiary, and the titular was duly  
 “ called, a sub-valuation may be approved of, though it  
 “ does not appear that the minister was either called or  
 “ present. (Macneil v. Muir of Campbelltown, June 3,  
 “ 1801, affirmed February 20, 1809.) 5. That extra-  
 “ judicial contracts or transactions may be the grounds  
 “ of decrees of approbation, if it appears either that  
 “ they were consented to by the minister, or that he,  
 “ being duly called in the process of approbation, makes  
 “ no objection to the decree being pronounced. This  
 “ point might have been thought at least doubtful, but  
 “ seems to be settled by these cases :—Lockhart v. Duke  
 “ of Hamilton, November 20, 1793; Hamilton v. Col-  
 “ brook, November 30, 1803; Goldie v. Hamilton,  
 “ November 22, 1820. 6. In the last case mentioned  
 “ it was decided, that where the minister was duly  
 “ called in a process of approbation of such an extra-  
 “ judicial valuation, to which he had not been a party,  
 “ and did not appear to object to it, he could not  
 “ afterwards reduce the decree of approbation pro-  
 “ nounced. The ground of decision was, that the  
 “ decree must be held to be equivalent to a decree of  
 “ valuation by the high commission. (1 Conn. p. 215.)  
 “ But the Court were much divided in opinion on that  
 “ case; and the judgment does not well accord with  
 “ those in the cases of Kinnoul and Speymouth in 1823,

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 28th August “ never been held or decided, that any extra-judicial  
 1833. “ valuation, by contract or arbitration between the  
 GORDON “ titular and the heritor, to which the minister has been  
 v. “ no party, can be insisted on as the ground of a decret  
 DUNN “ of approbation, where the minister appears in that  
 and others. “ process, and expressly objects to it. That is the pre-  
 “ sent case. The judgment in the case of Knox v. the  
 “ Heritors of Slamannan, June 23, 1773, is express,  
 “ even in a case where the minister for the time had been  
 “ a party to the contract, ‘ that nothing can ascertain  
 “ ‘ the value of the teinds in a question with the minis-  
 “ ‘ ter, but a proper decret of valuation by the proper  
 “ ‘ Court.’ (1 Con. p. 216.) And in the case of Col-  
 “ brook, the Court expressly condemned the practice of  
 “ extra-judicial valuations, even while they granted the  
 “ approbation, on the defect of title and interest in the  
 “ objecting party. The Lord Ordinary conceives, that  
 “ any valuation obtained by arbitration is in quite a  
 “ different situation from a report of the sub-commis-  
 “ sioners. In the latter, though not bearing that the  
 “ minister was called, it may be held, that the procura-  
 “ tor fiscal of the presbytery acted for the interest of the  
 “ church. But, independent of this, such reports have  
 “ the express authority of the statutes, declaring that  
 “ they shall be the grounds of decrees of approbation.  
 “ Extra-judicial arrangements, however well conducted,  
 “ have no such sanction. There are strong specialties  
 “ in this case, arising from the clause of relief in the  
 “ decret arbitral, from the decree of valuation in 1802,  
 “ and from the remarkable terms of the decree of ab-  
 “ solvitor in the process of reduction between the King’s  
 “ College of Aberdeen and Mr. Gordon, in 1809. But

“ the Lord Ordinary, having a clear opinion on the  
 “ general point, does not think it necessary to go into  
 “ these specialties.”

And in the augmentation, “ the Lord Ordinary (20th  
 “ December 1831) having considered this closed record,  
 “ and heard parties procurators thereon, in respect that,  
 “ in the relative process of approbation, he has pro-  
 “ nounced an interlocutor assoilzieing the defenders,  
 “ repels the pleas set forth by Colonel Gordon in this  
 “ process, founded on the valuation expressed in the  
 “ decret arbitral in 1760, reserving to him his rights  
 “ under the decret of valuation in 1802.”

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The Court having adhered to these interlocutors\*,  
 Colonel Gordon appealed (15th Feb. 1832); and after  
 hearing his counsel the House stopped the respondent.

LORD CHANCELLOR.—My Lords, in this case I do  
 not think it necessary that your Lordships should be  
 occupied with hearing the counsel for the respondents.  
 On a very careful examination of all the authorities  
 referred to on the part of the appellant, I entertain no  
 manner of doubt that the Court of Session, in affirming  
 the interlocutor of the Lord Ordinary, came to the right  
 conclusion, and that your Lordships must come to the  
 same conclusion as the result of the authorities. The  
 Lord Ordinary arrived at it after a careful, a judicious,  
 and a learned examination of those authorities.

My Lords, the course of proceedings in which this  
 question arises must never be lost sight of. It is a  
 question of the approbation of an extra-judicial valua-

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\* 10 S., D., & B., p. 338.

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tion entered into between the titular and the landowners in the absence of the stipendiary minister, and to which he is, for the first time, made a party, on an application to the Court for the approbation of the extra-judicial valuation. The Court have, by the raising of this action, which concludes simply for approbation of the extra-judicial valuation made seventy years ago, been placed in the same situation in which the Court was placed when the approbation was applied for in the earlier Hamilton case,—I mean the case of 1793,—upon an extra-judicial valuation which had been made an hundred years before, that is to say, the contract of valuation entered into by the Duchess Ann as the then owner of the lands; and the question here is, as it was there, Shall the Court hold the parties to be bound by the extra-judicial valuation? Is it justified in decreeing approbation of the former valuation? Is that former valuation binding upon the parties? My Lords, I refer, in the commencement of the few observations with which I think it necessary to trouble your Lordships, to the case of Hamilton in 1793, because it is said to be the beginning of a series of decisions bearing very much in favour of the appellant. Now, who were the parties there? The Duke of Hamilton, representing Duchess Ann on the one side, and the landowners on the other side. But it does not appear there that the minister did not also give his consent, the minister being the party who had a right to object—the Duke of Hamilton clearly having no right to object. Was or not that contract binding between the parties? That was the question in 1793. That it was clearly binding between the Duke of Hamilton and the landowners is certain, for the Duke of Hamilton was bound

by the contract of Duchess Ann his ancestor ; but the minister was not bound by that contract : and if the minister had chosen to take the objection, then they would have been there in precisely the same situation in which we are here ; but the minister took it not. The simple question with which the Court had to deal was with respect to the rights as between other parties,—the landowners on the one side setting up the contract of Duchess Ann, and the Duke of Hamilton, on the other, resisting that contract, and stating that he was not bound by it. The Court there held that the Duke of Hamilton was bound by it ; that, as between him and the landowners, it was as good as if the question had been between the landowner and Duchess Ann, the person with whom the contract was made ; but that between the minister and the landowner the question was not raised, because the minister does not appear to have made an objection. If the minister had taken an objection—if the minister had said, “ True, that is a “ contract binding between the Duke and the landowner, “ the Duke representing the maker of the contract on “ the one side, and the landowner on the other ; but, as “ minister, I am not bound by it ; it is as between you, “ the opposing parties, *res inter alios acta* ;” and the Court, in 1793, had repelled that objection, and found that the contract made one hundred and twenty years before was binding upon all parties as well as those two who were parties to the contract ; that, being binding upon them, it was consequently binding upon the minister, who had been no party to the contract, either in the person of himself or his predecessor,—this would have been a case precisely like the present ; but it is not a case at all like the present, because the minister

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did not object; and so with respect to the other two cases to which Lord Moncreiff, in that most able and distinct statement of the case to which I before adverted, refers,—and which I am not going too far in asserting to be a model for a judicial statement,—my Lord Moncreiff, contrary to what has been alleged, enters into the special circumstances and the result of the cases, and an approbation is most fully expressed of this interlocutor, particularly by the Lord Justice Clerk. It has been asserted to-day that those previous decisions had not been attended to—that this effect had been overlooked. Why, the subject matter of that series of cases is referred to in one of Lord Moncreiff's reasons, in which he lays it down, “ that extra-judicial “ contracts or transactions may be the grounds of decrees “ of approbation, if it appears either that they were “ consented to by the minister, or that he, being duly “ called in the process of approbation, makes no objec- “ tion ;” and he cites those very cases, beginning with *Lockhart v. the Duke of Hamilton* in 1793; so that it was on a consideration of this series of cases, supposed to be so much in favour of the appellant, and on the principle to be elicited from them, that he was led to the conclusion, in which the Court agreed with him, that there was a fact which differed those cases from the present, inasmuch as here no approbation whatever of the minister was shown, and the Court was of opinion that his approbation must be shown.

My Lords, it appears to me that the great distinction between a sub-valuation and an extra-judicial valuation, or a valuation by decret arbitral, as in this case, is too obvious to be for one moment overlooked. That distinction guides us through the whole of the cases, and

leads us safely to the decision at which the Court below arrived. In all the cases referred to by the counsel for the appellant, and particularly that of Campbelltown, the valuation or the sub-valuation is an act done in a quasi judicial proceeding instituted under the authority of two statutes, the act of 1633 and the subsequent act of 1661, and carried on before persons appointed by the highest authority in the state—by the Crown, with the approbation and assent of the estates in Parliament; the commissioners themselves being the judges, that is, the different officers of state, peers of the realm of Scotland, and members of the Lower House, the representatives of the Commons, and in that case fifteen to be a quorum,—the sub-commissioners being as much public functionaries and officers authorized by public appointment, and statutely authorized, as the commissioners themselves,—and all their proceedings being expressly endued by the act of parliament with the force of decreets, sentences, nay acts of parliament. My Lords, in one case a power is given of what they call rectifying—that is, of reviewing a sub-valuation come to after a proceeding has been regularly instituted before the commissioners; and in that one case only does the statute give the power of rectifying to the minister, not being the titular—that is to say, where he is only stipendiary, not being the person endowed with the tithes. Where he is merely a stipendiary he shall in that case, and in that case alone, have the power to rectify the valuation. The question is, whether there has been collusion; and whether the collusion between the parties instituting and carrying on the proceeding has been such as to produce an injury to the interest of the stipendiary minister to the extent of one third?

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Now, my Lords, to show that this permission of the statute is confined distinctly to the case of valuations under its authority, it is only necessary to look to the way in which that matter is put. After going through the whole proceedings the act continues thus:—"At-  
 " tour,"—that is to say, besides,—“ for clearing of all  
 “ doubts and difficulties which may arise anent the  
 “ rectifying of valuations, or other particular heads  
 “ following, his Majestie and estates have declared,  
 “ and declare, that where valuations are lawfully led  
 “ against all parties having interest, and allowed by the  
 “ former commissioners, according to the order ob-  
 “ served by them, that the same shall not be drawn in  
 “ question, nor rectified upon pretence of enorme leison  
 “ at the instance of the minister, not being titular, or  
 “ at the instance of his Majestie’s advocat, for and in  
 “ respect of his Majestie’s annuitie, except it be proved  
 “ that collusion was used betwixt the titular and heri-  
 “ tor, or betwixt the procurator fiscal and the titulars  
 “ and heritors; which collusion is declared to be where  
 “ the valuation is led, with diminution of the third  
 “ of the just rent presently paid, and which dimi-  
 “ nution shall be proved by the parties oathes.” This  
 being in the most express terms confined to that par-  
 ticular case—the valuation led under the statute—  
 can it be contended that we have the least ground  
 for applying this restriction, which is merely a restric-  
 tion upon the right of the minister, not being a titular,  
 to a case not within the statute—to a case not within  
 either the words or the spirit of the enactment, and  
 to which the reason whereupon that enactment is  
 grounded does not in the smallest degree apply—I  
 mean to the case whereof a contract, an extra-judicial

valuation, not in the course of proceeding instituted under the law, not carried on before commissioners appointed and authorized by the act, not having in any way the sanction which the act gives to valuations laid before those commissioners so appointed and so authorized—carried on between the parties—it being, in fact, only an expression of their own private contracting will between and among themselves, and which is of no manner of weight whatever, either within the words or the spirit of the act? My Lords, the case of Campbell then falls at once to the ground, as regards the argument for the appellant, which it is cited to support. That was the case of a sub-valuation—a valuation under the act. Accordingly, your Lordships will find that the whole of the argument in that case is grounded upon a reference to the act of 1633 and the act of 1661. On looking to the appeal case to see whether any other argument was raised, it appeared that there was a question of fact raised as well as of law.

With respect to the observation of the Lord Ordinary on a valuation by the procurator fiscal, I say nothing, because some doubt appears to exist whether, except in the case provided for by the terms of the commission of 1659, that would apply — whether in any case the procurator fiscal could value the land. It appears to me, from the expressions used by Sir John Connell in different parts of his work, and also the manner in which Lord Moncreiff mentions the procurator fiscal, as if he took it for granted as a matter of course that in such cases the procurator fiscal might have been used to be appointed to carry on proceedings representing interests in cases where the title did not appear.

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My Lords, this brings me to the observation which I threw out on a former day, when commenting upon the cases of appeal from the Scotch Court. I refer to an observation which I threw out respecting the discretion of advising appeals. I wish again to impress it upon your Lordships, and I do it with great satisfaction, because we are in the presence of learned counsel, all of whom must be perfectly aware that what I say cannot be supposed to have the most remote application to them. There is no duty which counsel ought more conscientiously to exercise, than that of advising appeals to this House from the Court of Session. They ought to feel that it is not a matter of course, when a case is brought to a learned counsel for his opinion, whether there is probable cause of appeal or not—that it is any thing but a matter of course that the learned counsel should sign his name to the statement,—of probable cause, merely because there was not an unanimous judgment in the Court below. The learned counsel are bound in such case to exercise the most abstinent discretion in recommending the expense, the delay, and the vexation which must be the consequences of an appeal to this House. I have no manner of doubt, from the names of the most respectable persons which are signed to this case, that in this instance they felt it to be an arguable point; and they may have been right in supposing that there was no former decision upon the question. It is certain that no decision had ever been made which ran upon all fours with the present case, and therefore in some respects this case might be thought fit to receive, in the last resort, the judgment of this House. My observation was pointed at cases that

frequently occur in the Court below, in which reasons are given perfectly sufficient to support the judgment, but where, if one single inaccuracy is found among those reasons, I have seen appeals brought, not because the decision was erroneous, but because some of the reasons given for it by the Court below were bad. That is no reason—it is any thing but a reason—for bringing the judgment of the Court below by appeal to your Lordships, provided judgment is generally well founded.

My Lords, I have no hesitation in recommending to your Lordships to affirm the judgment of the Court below; and I should further recommend to your Lordships to affirm it with full costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 238*l.* 8*s.* for his costs in respect of the said appeal.

GEORGE W. POOLE—CALDWELL & SON, Solicitors.

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No. 6. Sir PATRICK WALKER, Appellant.—*Dr. Lushington—Murray.*

JAMES GIBSON CRAIG, Esquire, Respondent.—*Lord Advocate (Jeffrey) Kaye.*

*Bona et Mala Fides—Writ.*—1. Circumstances in which held (affirming the judgment of the Court of Session), that a party holding a deputation to a public office by virtue of a commission vitiated in substantialibus was accountable for all the emoluments from the date of citation in an action by a party who had acquired right to the office.

*Public Officer.*—2. Question, Whether a party performing the duties of a public office in which he had been erroneously inducted was entitled to the emoluments?

2<sup>D</sup> DIVISION. Lord Pitmilley. **I**N the year 1750 Carr Lord Ballenden, principal usher in the Court of Exchequer in Scotland, granted a deputation to Mr. Archibald Tod, W. S., and Mr. Thomas Tod, W. S., his son, as deputies during their joint lives, and the life of the survivor.

Lord Ballenden died in the year 1753, and was succeeded by his son John. In 1778 Mr. Archibald Tod died; and on the 21st of April of that year William Walker (an attorney in Exchequer, the appellant's father,) entered into a transaction with Lord John, by which, in consideration of the sum of 250*l.*, his Lordship agreed to grant a commission, as deputy ushers of Exchequer, in favour of Mr. Walker and his son, the

late Mr. George Walker, solicitor in London, “ from  
 “ and after the death, voidance, or resignation of  
 “ Mr. Thomas Tod, W. S., presently acting as deputy  
 “ in said offices.”

In 1791 the Mr. Walker entered into another trans-  
 action with Lord John, the object of which was to  
 obtain a deputation in which the name of the appel-  
 lant, who was an advocate at the Scottish bar, should be  
 substituted in the place of that of his father. This was  
 acceded to on payment to his Lordship (who was in  
 very embarrassed circumstances) of ten guineas. The  
 commission was accordingly executed by Lord John on  
 the 23d of December 1791. It proceeded upon a  
 recital that the deputation previously granted in favour  
 of William and George Walker had been resigned ; and  
 “ therefore know all men by these presents that I, the  
 “ said John Lord Ballenden, for the valuable consi-  
 “ derations formerly mentioned, and certain other  
 “ valuable considerations and good causes moving me,  
 “ do hereby, for me, my heirs and successors in the said  
 “ office of heritable usher and doorkeeper of the said  
 “ Court of Exchequer, nominate, constitute, and appoint  
 “ the said George Walker and Patrick Walker, lawful  
 “ sons of the said William Walker, during all the days  
 “ of their lives, and the survivor of them, to be deputy  
 “ ushers and doorkeepers of the said Court of Exche-  
 “ quer under me, my heirs and successors, from and  
 “ after the death, voidance, or resignation of the said  
 “ Thomas Tod presently acting as deputy in the said  
 “ offices, to begin from and after the vacancy or other  
 “ determination of the right or interest of the said  
 “ Thomas Tod for and during the natural lives of the  
 “ said George Walker and Patrick Walker, or the

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“ survivor of them ; giving hereby and granting full  
 “ right, title, and power to the said George Walker  
 “ and Patrick Walker jointly, or either of them, and  
 “ the survivor, to possess, enjoy, and exercise the said  
 “ office, and to uplift, receive, and discharge all salaries,  
 “ fees, profits, casualties, duties, and privileges per-  
 “ taining to the said office of deputy usher and door-  
 “ keeper, in as full and ample form and manner as the  
 “ same have been in use to be received and enjoyed by  
 “ any former deputy in the said office ; and generally  
 “ every other thing in the premises to do and exercise  
 “ as fully and freely in all respects as I, my heirs and  
 “ successors, could do if personally present, and as my  
 “ former deputies in the said office have been in use to  
 “ do in times bypast.” This commission was recorded  
 in the books of Exchequer.

Lord John died in October 1796 insolvent, and was succeeded by his uncle Robert. The latter died soon thereafter (also insolvent), after having been charged to enter heir to Lord John, which he did, cum beneficio inventarii. Their respective creditors proceeded to lead adjudications of the office of principal usher, and acquired right to be ranked *pari passu*. The appellant's father acted as trustee for a large body of Lord John's creditors in name of a Mr. Sommers, a vintner in Edinburgh, while Mr. Gawler adjudged as a creditor of Lord Robert.

In 1800 Mr. Thomas Tod died, whereupon the appellant and his brother presented their commission, and were received into the office of deputy usher. Thereafter a process of ranking and sale of the office of principal usher was raised at the instance of Sommers, in which the appellant's father acted as common agent, and

the appellant as counsel; and on 27th February 1802 the Court “ordained the said heritable office of usher-ship and doorkeeper of Exchequer, with the whole fees, profits, and benefits belonging to the same, and free ish and entry thereto, with the power of appointing deputies, as more particularly described in the aforesaid prepared state and memorial and abstract” to be sold; “but under the reservation always to the said George and Patrick Walker, and the survivor of them, of all right, title, and interest they and each of them have in said office, salary, fees, and perquisites thereof, as deputies therein, during all the days of their respective lives, according to and in terms of the commission granted in their favour.” This reservation having been objected to by certain of the creditors, the Court altered and modified it so as that, in place of the words “according to and in terms of the commission granted in their favour,” the reservation should be “so far as they have right thereto by their said commissions.”

The office of principal usher was thereupon exposed to sale on the 18th July 1802, at the upset price of 479*l.* 7*s.*, and after a competition (in which the appellant’s father was a bidder) it was purchased by the respondent for the sum of 1,370*l.* On the 6th of November thereafter the respondent instituted an action against the appellant and his brother, Mr. George Walker, for having their commission as deputies reduced, on these grounds:—“Primo: The said commission is false and vitiated in substantialibus, and it wants the name, subscriptions, and designations of the writer and witnesses. Secundo: By the charter granting the office of heritable usher and doorkeeper of our Exchequer

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“ in Scotland, power is given to the granters to name  
 “ deputes, for whom they should be answerable, and  
 “ no otherways; but by the said charter no power is  
 “ given to the granters to name deputes whose right  
 “ should continue longer than the subsistence of the  
 “ granter’s own right; and by the charter the said  
 “ parties are virtually debarred from the power of ap-  
 “ pointing deputes to continue in office for a longer  
 “ time than that of the subsistence of their own right,  
 “ and therefore the said deputation now to be reduced  
 “ necessarily fell, in respect that the said principal office  
 “ of heritable usher and doorkeeper of our Exchequer  
 “ in Scotland was adjudged from the said deceased  
 “ John Lord Ballenden by his creditors, in whose right  
 “ it now is, and also in respect of the death of the said  
 “ deceased John Lord Ballenden; and also that in  
 “ respect that the creditors of the said John Lord  
 “ Ballenden brought a process of sale of the foresaid  
 “ office before the Lords of Council and Session, in the  
 “ course of which the same was sold by the said Lords  
 “ and purchased by the pursuer. Tertio: The said John  
 “ Lord Ballenden never had sufficient power to grant  
 “ the said deputation, because he never made up any  
 “ titles to the said office as heir to his predecessors who  
 “ were infeft in the same; and therefore, and for other  
 “ reasons to be proponed at discussing hereof, the said  
 “ commission, and all that has followed thereon, ought  
 “ and should be reduced,” &c. There was also a  
 conclusion to account for the emoluments of the office.

On production of the commission it was discovered that the signature of one of the witnesses to the execution was written on an erasure, and that the word “ witness ” annexed to the signature was in a different

handwriting from that of the signature. The witness was ordered to be examined, and acknowledged his signature, “but he does not recollect the deed itself, “nor the circumstance of subscribing it. And being “farther interrogated, whether the word witness added “to his subscription in the deed under challenge be of “his handwriting,—depones that it is not, nor can he “positively say whose handwriting it is, though, from “the appearance of it, especially that of the letter W, “he rather inclines to suppose it the handwriting of the “defender, Mr. George Walker. And being shown and “desired to look at the third page of the deed, and say “whether there has not been a previous erasure at the “place where his subscription now is, and whether he “recollects any thing of the said erasure, or when or “by whom it was made,—depones that from now “looking at the third page of the deed he is satisfied “that there has been an erasure, but he does not “know any circumstances respecting it.”

The proceedings in the action were suspended till the beginning of 1807, by certain obstacles arising from disputes among the creditors (which the respondent alleged were instigated by the appellant’s father), by which a decree of sale was prevented from being issued in favour of the respondent; but this being at last obtained, the action was resumed; and on 16th of June 1807 the Court pronounced this interlocutor:—“Sustain “the reasons of reduction founded on the *ex facie* “vitiatio in substantialibus of the commission, and “reduce, decern, and declare accordingly; and remit “to the Lord Ordinary to hear parties on the other “points of the cause, and to do as he shall think fit.”\*

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Against this judgment the appellant entered an appeal; and the Court, on an application by the respondent for interim possession, found him entitled to it; and against this judgment the appellant also entered an appeal. The House of Lords in the principal appeal pronounced, on the 11th of May 1814, this judgment:—  
 “ The Lords Spiritual and Temporal, in Parliament assembled, Find that the commission 23d December 1791 is reducible as vitiated in substantialibus; and it is therefore ordered and adjudged that, with this finding, the cause be remitted back to the Court of Session in Scotland, to apply such finding and to hear parties further on all the other points of the cause.”\*  
 The appeal against interim possession then fell as a matter of course.

Thereafter the appellant's father, and his brother George, brought an action of declarator against the respondent, upon the narrative of the commission which they had obtained from Lord John as deputy ushers of Exchequer in 1778, for the purpose of having it declared that they had right, in virtue of that commission, to enjoy the office of deputy usher.

To this action the respondent pleaded, in defence, that the deputation by Lord John had been resigned, and a new one granted in favour of George Walker and the appellant, or the survivor of them; and that the office of principal usher had been sold by judicial sale, and purchased by the respondent solely under burden of this new commission.

The two processes were conjoined; and on the 6th of July 1814 the Lord Ordinary, in the reduction at

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\* See 2 Dow, 270.

the instance of the respondent against the appellant, reduced and decerned conform to the reductive conclusions of the libel; and, in the action of declarator at the instance of the appellant's father and brother, sustained the defences, and assoilzied. To this interlocutor the Court adhered on the 17th of January 1816. An appeal having been entered, the House of Lords, on the 22nd of February 1819, affirmed the interlocutors.

The question which now remained for decision related to the period from which the appellant and his brother should account for the emoluments of the office, and as to the amount intromitted with by him. Lord Pitmilley, on 15th of November 1821, found “ that the defenders must account to the pursuer for “ the profits and emoluments of the office of deputy “ usher of Exchequer from the 6th of November “ 1802, the date of citation to this action, to the “ time when the pursuer was put into possession by “ a judgment of this Court in 1809; and ordained “ the defenders to give in an account of their in- “ tromissions accordingly, and that within fourteen “ days.” The appellant and his brother having presented a reclaiming petition, the Court on 29th of May 1823 pronounced this interlocutor:—“ In respect “ all questions with regard to the amount of the intro- “ missions to be accounted for will be open before the “ Lord Ordinary, adhere to the interlocutor reclaimed “ against, and refuse the desire of the petition; and “ reserve to his Lordship, at the issue of the accounting, “ to determine as to all claims of expenses.”\*

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\* 2 S. & D., p. 348 (new ed. 306).

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The cause having returned to the Lord Ordinary, various questions arose in the accounting chiefly of a special nature; one being whether the appellant was entitled to any allowance for alleged services performed by him, but which it was denied and not proved that he had ever performed; and another as to an allowance by the crown of 50*l.* a year, which the appellant alleged was a pension not attached to the office but personal, while the respondent averred that it was a part of the emoluments of the office. The Lord Ordinary, on the 3d June 1824, pronounced this interlocutor:—" Finds the  
 " defender Sir Patrick Walker liable to the pursuer  
 " for the sums of fees condescended on, with legal  
 " interest from the end of the years in which the same  
 " were received: Finds him also liable for sums of  
 " salary or pension condescended on, with legal interest  
 " from the receipt of each sum: But finds, per contra,  
 " that the defender is entitled to deduct the sums  
 " actually paid to the person or persons who performed  
 " the duty of the office libelled, with legal interest on  
 " the same since paid; and appoints him to put in a  
 " condescendence of the sums so paid for doing the duty,  
 " and that within ten days, with certification that if not  
 " then put in, an interim decree will be granted." And on refusing a representation his Lordship issued this note:—" The present representor and his brother  
 " jointly keeping an office which has been found to have  
 " belonged to the pursuer, it seems to the Lord Ordinary they must either of them be liable for the whole  
 " emoluments thereof, so far as the pursuer is entitled  
 " to claim these. Then the Court having found the  
 " defender liable to account for the emoluments of the  
 " office, not before but after a certain date, it appears to

“ the Lord Ordinary that this clearly implies that  
 “ before that date the defender was in bonâ fide, but  
 “ after that date he was in malâ fide, in keeping the  
 “ office. If, however, the defender be held to have kept  
 “ the office malâ fide, the Lord Ordinary does not think  
 “ that he can claim from the pursuer payment for his  
 “ own trouble in doing so, and of course as little for  
 “ that of his brother. It seemed, and still seems, to be  
 “ admitted by the pursuer, that the duty or part at least  
 “ of the duty of the office was such that neither the  
 “ defender nor pursuer could have executed it in per-  
 “ son, but only by paying any inferior person to do it;  
 “ and this payment the pursuer did not and does not  
 “ yet appear to deny ought to form a deduction from  
 “ the emoluments of the office; and this is implied in  
 “ the interlocutor of the Lord Ordinary. But the  
 “ personal trouble of the defender in keeping the office  
 “ after his bona fides has been held to have ceased is a  
 “ different thing. As to the 50*l.* a year, it seems to the  
 “ Lord Ordinary that it was a known and ordinary  
 “ accessory of the office. The defender’s predecessor in  
 “ the possession of the office had it as holding the office,  
 “ the defender had it in the same way, and the pursuer’s  
 “ nominees in the office have since had it in the same  
 “ way. The defender, therefore, by keeping the office  
 “ malâ fide (as has been found), kept the pursuer out of  
 “ this accessory profit, and drew it himself; and the  
 “ Lord Ordinary cannot see any substantial ground  
 “ why he should not account for it himself. The Lord  
 “ Ordinary is in no respect moved by the statements that  
 “ the office was malâ fide acquired at first, or was malâ  
 “ fide kept all along; nor does he pass any judgment  
 “ now as to when the defenders bona fides ceased: he

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 29th August “ of the Court. The Lord Ordinary has looked over  
 1833.      “ the case of Jackson against M'Donald (not quoted by  
 WALKER    “ either party), but has not found that it touches the  
 v.         “ point here exactly.”  
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The appellant having presented a reclaiming note to the Court, their Lordships, on the 26th of June 1827, pronounced this interlocutor:—“ Find that, in addition  
 “ to the sums which the petitioner has been found  
 “ entitled to deduct, he is also entitled to a suitable in-  
 “ demnification for any part of the duty performed by  
 “ him in person, and remit to the Lord Ordinary to  
 “ receive a condescence accordingly, and quoad  
 “ ultra adhere to the interlocutor complained of.”\*

The cause having again returned to the Lord Ordinary, and a condescence having been lodged by the appellant, the Lord Ordinary remitted to Mr. Adam Longmore of the Exchequer, “ to inquire into and ascertain  
 “ the amount of the fees and salary due by the defender  
 “ to the pursuer, and the deductions and indemnifica-  
 “ tions the defender is entitled to from the pursuer, on  
 “ the principles fixed by the interlocutors of 8th June  
 “ 1825 and 26th June 1827, and to report to the  
 “ Lord Ordinary *quamprimum*, it being understood  
 “ and agreed to that the said report shall have the same  
 “ effect, and none other, that the verdict of a jury in  
 “ relation to the points remitted and disposed of by the  
 “ said report would have had.” Mr. Longmore made a report, in which he stated, *inter alia*, “ that he has very  
 “ frequently called upon the defender's agent to furnish  
 “ him with an account of the deductions and indemni-

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\* 5 S. & D., 843 (new ed. p. 782).

“ fications he is entitled to in respect of the said office ;  
 “ and the only answer he received is that which is  
 “ stated in process, namely, that as the defender did  
 “ the whole duty he considers himself entitled to the whole  
 “ salary and emoluments,” a statement which Mr. Long-  
 more did not consider to be satisfactory. Thereafter, the  
 appellant having undertaken to comply with the requisition,  
 the case was again remitted to Mr. Longmore, who reported  
 “ that the defender had not adduced any evidence of his  
 having performed in person any of the duties of the office ;  
 and, so far as the reporter knew, the defender never performed  
 in person any of such duties.” The appellant then tendered a  
 note of objections ; but the Lord Ordinary, on 21st January  
 1831, pronounced this interlocutor :—“ Finds that the written  
 note of objections tendered against Mr. Longmore’s reports is  
 not admissible as a step of process : and having at the bar  
 resumed consideration of the said reports, and heard parties  
 thereon, approves of the said reports, repels the objections  
 stated against the same, and decerns against the defender, in  
 terms thereof, for payment to the pursuer of the sum of  
 1,269*l.* 16*s.* 7-<sup>5</sup>/<sub>10</sub>*d.*, with interest thereof from the 15th  
 day of February 1830 ; and appoints parties procurators  
 to be ready to debate, on Tuesday next, at the end of the  
 motion roll, on the question of expenses.” On this latter  
 point his Lordship, on the 26th, found the respondent  
 “ entitled to expences in this Court since the last appeal to  
 the House of Lords was determined.” Both parties having  
 presented reclaiming notes, the Court, on 13th May 1831,  
 pronounced this interlocutor :—“ The Lords having considered  
 this note (the appellant’s), and another re-

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 29th August “ ceedings, adhere to the interlocutor of the Lord  
 1833.      “ Ordinary, with this variation, that the accumulation of  
 WALKER   “ the principal sum and interest thereof, to the effect of  
 v.         “ bearing interest on such accumulated sums, shall not  
 CRAIG.   “ take place prior to the date of the decret on the 21st  
            “ of January last, and quoad ultra refuse both notes.”\*

Sir Patrick Walker appealed.

*Appellant.*—1. The appellant was on good grounds entitled to believe that his commission as deputy usher of Exchequer was valid and effectual till reduced by a judgment of the Court of Session ; and therefore he is not bound to restore to the respondent the fruits and emoluments of the office which were bonâ fide percepti et consumpti. It is an established principle that bona fides is always presumed, and therefore the onus of proving mala fides lies on the respondent.† But the only reasons alleged for inferring mala fides is, that the commission was liable to a technical legal objection. The signature of the witness was proved to be authentic ; and the Judges, in deciding the case, had the greatest difficulty in finding that it was a good objection. Neither did the acts of the appellant indicate any mala fides. On the contrary, he recorded the commission in the books of Exchequer ; and if he had considered for a moment that it was invalid, he could easily have got a valid deed from the granter. Besides, the commission was received by the Barons of Exchequer without objection, and the appellant and his brother were inducted

\* 9 S. & D., p. 587.

† Stair, b. ii, tit. xii. sec. 7.

into the office. It is impossible, therefore, to maintain, under such circumstances, that the mere citation to an action must have the effect of inducing mala fides, for this would be to give to the allegation of a pursuer an effect which can only be produced by the judgment of the Court.\* Mala fides is induced from the date of the citation in those cases only where the statement in the summons carries along with it the most indubitable conviction of its truth and efficacy. But in the present case, this was so far from being so that the question was held by the Judges to be very doubtful; and the judgment of this House found, not that the commission was null and void ab initio, but simply that "it is reducible as vitiated in substantialibus,"—a decision which recognizes the commission as a good title of possession till actually reduced. But the distinction between a reducible deed, and one which is null and void from the beginning, must always be gathered from the nature of the particular case. If it be a contract contra bonos mores, it is null from the beginning, and all the parties are in malâ fide from its commencement. But if the question depend upon the construction of a particular clause, or upon the power which is supposed to be given by a particular deed, although the right granted be in the end reduced, its reduction does not carry along with it the consequences of mala fides,—the restitution of all the fruits, whether percepti or consumpti.†

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\* Stair, b. i. tit. vii. sec. 28; Stair, b. ii. tit. i. sec. 24; Erskine, b. ii. tit. i. sec. 25, 27, 29.

† Douglas v. the Laird of Wedderburn, 19th July 1664; Leslie v. Leslie, 13th Feb. 1745, Mor. 1793; Bonny v. Morris, 30th July 1760, Mor. 1728; Leslie Grant v. Dundas, 9th Feb. 1765, Mor. 1728; Duke of Roxburghe v. the Duchess Dowager of Roxburghe, 17th Feb. 1815,

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2. But even on the supposition that the commission in favour of the appellant and his brother were reducible as being vitiated in substantialibus, and that from the date of the service of the summons they must be presumed in law to be aware of the serious character of the objection to its validity, still, so long as they discharged the duties of the office with the sanction and under the authority of the Barons of Exchequer, they were, as public functionaries, entitled to draw the salary and emoluments of the office, without being subject to any claim of repetition on the part of the respondent. The appellant and his brother were regularly inducted into the office of deputy ushers. The Barons of Exchequer received the commission, sustained it, and ordered it to be recorded in the books of court, whereupon the appellant and his brother received the sign manual for the salary of 50*l.* per annum, as the persons discharging the duties of the office: they were therefore bound, and could not refuse, to perform the duties of the office, for if they had declined, the barons could have obliged them to perform them. Therefore, so long as the appellant and his brother executed the functions of the office, they were equally entitled to the emoluments of it, as the highest officer in the state is to the emolu-

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Fac. Coll.; *Turner v. Turner and Watson*, 3d March 1820, Fac. Coll.; *Bowman v. Henderson*, 11th June 1805, App. Mor. *Bona et Mala Fides*; *Smith v. Beaton*, 6th Feb. 1810, Fac. Coll.; *Duke of Buccleugh v. Hyslop*, Nov. 1822, affirmed in the House of Lords 10th March 1824, 2 Shaw's App. Ca. 43; *Elliot v. Pott*, 29th Jan. 1822, affirmed 10th May 1824, 4 S. & D. 604, 2 Shaw's App. Ca. 181, 286; *Agnew v. E. of Stair*, 22d July 1828, ante, iii. p. 286; *Moir v. Mudie*, 16th June 1826, 4 S. & D. 725 (new ed. 731); *Carnegie v. Scott*, 4th Dec. 1827, 6 S. & D. 206; *Duke of Gordon's Trustees v. Innes*, 19th June 1828, 6 S. & D. 996, affirmed 10th Nov. 1830, ante, iv. 305; *Brisbane's Trustees v. Lead*, 26th Nov. 1828, 8 S. & D. 65; *Colquhoun Stirling v. Dunn*, 14th Jan. 1831, 9 S. & D. 276.

ments of his office ; and, till they were ejected by competent authority, they were not only entitled, but bound, to perform the duties of the charge, and at the same time entitled to receive the benefits accruing from it.\*

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*Respondent.*—1. It is a general principle of law, that when a party has been found entitled to a subject improperly withheld from him he has right to its fruits from the time when it ought to have been restored to him. Where the possession has begun in bonâ fide, the question as to when the bona fides ceased must depend for its solution on all the circumstances, and is in some degree in arbitrio judicis. Mr. Erskine says, that “the scientia rei alienæ is most ordinarily presumed to commence when the proprietor insists in his action against the possessor ; for, by the libelled summonses in that suit, the possessor has full opportunity to consider the strength of his own right which is brought under challenge ; and if his title appear by the nature of the action to be lame or insufficient the citation must induce mala fides.†” All the circumstances of this case support the general principle so laid down. Both the appellant and his father were professional men, and the deed was prepared by the latter, and could not fail to be well known to the appellant. It bore, ex facie, a radical nullity ; and even if they could pretend that they were not aware of this before the institution of the action, the appellant cannot be allowed to plead ignorance after it was served on him. The validity or invalidity of the deed did not depend on the applica-

\* Simpson v. the College of Aberdeen, 7th June 1809 ; and Jackson v. M'Donald, 5th July 1811, Fac. Coll.

† Ersk. b. ii. tit. 2. sec. 29.

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tion of abstract principles of law; its invalidity was obvious at a single glance, and more especially to the appellant, who was a member of the bar, and at that time engaged in practice. The consciousness of its invalidity is made more apparent by the attempts to get its validity recognized in the articles of roup; and the objection then given effect to by the Court to the reservation must have called the appellant's attention to the fact, that the deed was likely to be challenged, so that he was put on his guard. It is therefore impossible for the appellant to say that he stood in the position of those who, in the words of Lord Stair, "consume the fruits without expectation of "repetition or account."\*

2. The report of Mr. Longmore having decided the fact that the appellant performed none of the duties of the office, renders unnecessary any inquiry as to whether he would be entitled to the emoluments if he had performed them.

LORD CHANCELLOR.—My Lords, though I shall not, for the reasons I am presently to state, recommend that this case should be finally disposed of, at least in all its parts, yet I shall throw out on the present occasion to your Lordships the opinion which I have formed on hearing the arguments at the bar and on reading the arguments in the cases brought before us. Nothing can be more clear, than that the question of bona fides in the possessor of the fructus percepti is a question of circumstances, and must be taken as such in each

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\* 2 Stair, 1, 32; Agnew v. Hathorn, 17th July 1746, Mor. 1732; Blair v. Bruce Stuart, 18th Nov. 1783, Mor. 1775; More v. Anderson, 9 S. & D. 744, Ersk. b. ii. tit. 2, sec. 28.

particular case; and to lay down a proposition like that which appeared to be asserted in one part of the argument on the part of the appellants, from the words rather than the plain meaning and spirit of some of the decisions of this House upon the question, that until the ultimate decision of a disputed point in the Court of last resort, viz. your Lordships House, mala fides or conscientia rei alienæ on the part of the possessor cannot be presumed or be made the ground of proceeding on the part of the Court. To lay down such a proposition as that would be neither more nor less than affirming this monstrous doctrine, that any person might purchase a disputed claim, and provided it were of a large amount, might purchase a property or any other possession—any other right, with a most disputed title—provided it were of a large annual value, and then keeping possession during the litigation, which would be the inevitable consequence of such a purchase, might be safe, on the consideration that the annual expenses of the litigation, and even of all costs thrown upon him ultimately in that proceeding for setting his title aside, being less than the annual value of what he had bought, he could all that time pocket the difference, and ultimately keep it, and therefore become a gainer by such grossly unfair means. It would reduce it in every case to a mere consideration of the value. If the legal expenses were 50*l.* a year and the property were worth 550*l.* a year, the profit would be 500*l.* a year, from the impossibility of attacking that 500*l.* until the ultimate decision of the Court of Appeal. That would be the consequence of a proposition so monstrous. I was exceedingly glad to find the counsel for the appellant did not push the doctrine to that length, for it was one

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which upon the very face of it was too absurd to deserve a moment's notice. It depends, therefore, on the particular facts and circumstances of each case; and in one case it may be the mala fides begins from citation, in another case it may be the mala fides begins from the first decision, and there may be cases where until the ultimate decision of the Court of Appeal the mala fides does not commence.

In this case, then, the purchaser having paid bonâ fide for this office held by purchase, the question is, whether he was in mala fides in the year 1802, or not until the year 1809? And upon the whole, when I take into consideration the nature of the vice in the title of the appellant, and that the instrument on the face of it called the attention of the party in whose possession it was to the other circumstances upon the face of it also, though not so apparent upon the first inspection—I mean the erasure, which was apparent from the difference in the colour of the ink, (assuming all the while that the fac-simile, to which your Lordships have access, is an accurate representation of the original in the colour of the ink, as well as in the form of the writing,)—I say, my Lords, that which at first sight appears on the most cursory inspection sufficient to attract attention, and to lead the party possessed of it to a more close examination of the other matters appearing upon the face of it, and clearly indicating that there had been the important circumstance of the witness's name written over an erasure,—was sufficient notice to him that there most probably would be a ground for the reduction of the instrument. Why, then, he might have inquired of Charles Cummins the witness, to whom he had as much access as the Court



had ; he might have inquired of him all the particulars of which upon his examination the Court afterwards became possessed. What was there that the party did not know, or (which is the same thing) might not know, which either was not or might not be known to him immediately on his being served with the summons ? If he did not think fit upon that service to look at the instrument which was made the ground of reduction, surely he had himself only to blame for not so inspecting it. If he looked at it carelessly,—if he did not pay due attention in the inspection of it,—there, again, he had himself only to blame ; but if he, a professional man, looked at it and saw what clearly appears upon its face, and did not have recourse to the inquiry which its aspect manifestly ought to have suggested to him or those who advised him, viz. to inquire farther of Charles Cummins the attesting witness,—there, again, he had only himself to blame. He had obviously access to all those particulars, whether upon inspection or upon inquiry, of which the Court became possessed, and upon which the Court pronounced their opinion in the first instance by a very great majority, though only one of the learned Judges then in the Court pronounced the precise opinion which was at all times sustained, and afterwards finally affirmed by this House.

My Lords, with respect to the defence they now raise to the interlocutor here and the defence to the interlocutor below, that has been the ground of a good deal of remark in the course of the argument, and it is not necessary I should trouble your Lordships with any further remarks upon it. It appears to me that this House affirmed the interlocutor, and remitted it back to the Court of Session only because they deemed that

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more than the *ex facie* vitiatio in substantialibus was necessary to be the ground of that decision. Then, does it amount to more than this, that the Court of Session having relied on one ground or on one part of the evidence, the House of Lords relied upon another, though they ought to have relied upon the whole, inasmuch as they might find that one part was not sufficient to support the interlocutor, and remitted it with that instruction, recommending to the Court below that they should, instead of founding their judgment upon one part, found their judgment upon the whole. The Court then had nothing new whereupon to found its judgment, but only had the same evidence, the same authorities, and the same arguments before it in the last instance which it had had in the first instance. The remit could not be said to cast any doubt on the judgment; it could not be said to express any difference of opinion with those who pronounced that judgment; but the House of Lords had, when it came before them, upon the whole thought it would have been better to give one reason for it, whereas they had given another; but there was no doubt, there was no difference, there was no discrepancy of opinion.

My Lords, I am, upon the whole, therefore clear there was no *bonâ fide* possession after the year 1802; and if I recommend your Lordships to postpone ultimately disposing of this case for the present, it is only that I may have time to look into those interlocutors appealed from in which the question is raised with respect to Mr. Longmore's report, and as to the interest. With respect to the interest, I will merely say, I have seen the opinion the Court below has given, with which I agree. As to Mr. Long-

more's report, I have not had that so explicitly before me in the consideration I have given to the argument, and the statements which I read before I came here, as to the other parts of the case ; and therefore I should wish to have time to reconsider that part of the question.

My Lords, the authority which has been cited at the bar, and which was before your Lordships originally in the former appeal, is that of Lord Stair, which leaves it perfectly clear how fatal to a deed any writing of a substantial nature upon an erasure must be. Lord Stair, after stating the particular case, says, " the worst " kind of deletion is where the words deleted cannot be " read, for if they are so scored that they can be read, it " will appear whether they are in substantialibus, but if " they cannot be read, they will be deemed to be such," (that is to be in substantialibus,) " unless the contrary " appears by what precedes and follows;" to which, in the original, there is this added, which is not given in this excerpt, " unless some note of the deletion is in the " margin, or some such words as those are to be found " in the original." My Lords, it is quite clear why the law of Scotland by the act of 1685 and the practice of the Courts under that act gives such particular weight to objections of this description. They are much more important in that law than they are in ours, because we have no such thing as an instrument proving itself. Unless an instrument be of a certain age it does not prove itself ; but in Scotland, if it be ever so recent, provided the statutory solemnities are duly complied with, the instrument proves itself ; consequently it becomes the very essence of those solemnities that every one of them should be most strictly adhered to ; and none can be conceived more important than that of

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the whole instrument appearing on the face of it to be such as it was originally at the time of the execution. Now, Lord Stair says, and most justly, that if an erasure be so complete as to render it impossible to decipher what may have been originally written, every thing should be presumed. That is the substance of the opinion given by Lord Stair. It must be presumed to be in *substantialibus*; and in such a case as this it does not appear to me it would be going too far, when it appears the name of the subscribing witness has been written on an erasure, to presume that the original name was of a witness wholly incompetent; it might be the very party taking under the deed who attested the execution of it.

My Lords, it appears to me in this case the Court below have come to a perfectly right decision on the present question, which they appear to have decided unanimously, as well as the original question out of which this arises; which was the origin of this very tedious, protracted, and expensive litigation, and which they had all unanimously decided. One of the learned Judges is said not to have made up his mind until he came into Court; for any thing that appears to the contrary he may not have inspected the instrument. I should rather infer from what he is stated in the report to have said that he had not, and I do not wonder his Lordship had not made up his mind if such should be the fact; but ultimately he entirely agreed with his learned brothers in the decision they came to. Another of the learned Judges, now no more, appeared to entertain so much doubt that he did not give any opinion. For my own part, I should conceive the Judges who formed the majority in that case had no reason to

entertain any doubt on a case such as this. Upon these grounds therefore I shall, in all probability, afterwards recommend your Lordships to affirm the judgment in all respects; but, for the reasons I have given touching the argument raised respecting Mr. Longmore's report, I shall, until I have looked into it, for the present postpone moving your Lordships to give final judgment.

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His Lordship afterwards moved, and

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein appealed from, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 237*l.* 13*s.* 10*d.* for his costs in respect of the said appeal.

RICHARDSON and CONNELL—MONCREIFF, WEBSTER,  
and THOMSON, Solicitors.

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PATRICK CAMERON, Esquire, for GEORGE FENTON CAMERON, his infant son, Appellant.—*Lord Advocate (Jeffrey)—Jervis.*

JOHN MACKIE, Esquire, and others, Trust Disponees and Executors of the late JAMES DICK, Esquire, Respondents.—*Dr. Lushington—H. Robertson.*

*Trust—Revocation—Foreign.*—Held (affirming the judgment of the Court of Session), 1. That a trust disposition of heritable subjects in Scotland of which the granter should die possessed, and referring to trust uses as specified in any will executed or to be executed by him, constitutes, with a will executed in England according to the English forms, an effectual conveyance of the heritage in Scotland for the purposes set forth in the English will.

2. That it was no objection to the disposition that the disponees were described as executors under a will which was afterwards revoked, they being otherwise properly designed, and

3. That a Scotch conveyance of heritage cannot be revoked by a deed not probative by the law of Scotland, although probative by the place of its execution.

*Expenses.*—The expenses incurred in trying the validity of a trust conveyance for charitable purposes, and to the exclusion of the heir at law, ordered to be paid out of the trust funds.

1ST DIVISION. **T**HE late James Dick of Finsbury Square, London, Lord Moncreiff. was a native of the north of Scotland; and his niece

was married to Patrick Cameron, sheriff substitute of Elginshire. Of this marriage there was a child, the appellant George Fenton Cameron, who was the heir at law of Mr. Dick. That gentleman had early formed the resolution to dispose of his property after his death, for the purpose of promoting education in the northern parts of Scotland, and had communicated his intention to his law agent in Edinburgh. His property consisted partly of money invested in heritable bonds in Scotland, and partly in the public funds, or otherwise, in England. He had, previous to 1823, made a will or testament in the English form; and under the advice of his agent in Scotland he executed, on the 14th November 1823, a disposition in these terms:—“ Know all men by these  
 “ presents, that I, James Dick, Esq., residing in Finsbury Square, London, for sundry good causes and  
 “ considerations me hereunto moving, do hereby give,  
 “ grant, assign, and dispone, from and after my death,  
 “ to and in favour of John West of Gower Street,  
 “ Bedford Square, in the county of Middlesex, Esq.;  
 “ John Mackie the younger, of Fenchurch Street, in  
 “ the city of London, merchant; James Alexander  
 “ Simpson of Doughty Street, Mecklenburgh Square,  
 “ in the said county of Middlesex, gentleman; and  
 “ John Dick, a captain in the royal navy, executors  
 “ named and appointed by me, conform to will in  
 “ the English form already executed by me, and the  
 “ survivors and survivor of them, and the heirs of the  
 “ survivor, and their or his disponees and assignees,  
 “ declaring that a majority of them acting for the time  
 “ shall constitute a quorum, all and sundry lands and  
 “ heritages, with all debts heritable and personal, and  
 “ whole sums of money and effects situated in Scotland,

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 29th August      “ resting, and owing to me any manner of way at the  
 1833.      “ time of my death, with the whole vouchers, title deeds,  
 CAMERON      “ securities, and instructions thereof, and whole clauses  
 v.      “ therein, together with all right, title, and interest  
 MACKIE      “ which I have to the said subjects, heritable and per-  
 and others.      “ sonal, in Scotland, belonging to me at the time of my  
                   “ death. Moreover, I do hereby bind and oblige me,  
                   “ my heirs and successors, to infest and seise the said  
                   “ John West, John Mackie, James Alexander Simp-  
                   “ son, and John Dick, and the survivors and survivor  
                   “ of them, and the heirs of the survivor, and their or  
                   “ his foresaids, in the whole of said subjects above dis-  
                   “ poned requiring infestment ; and for that purpose to  
                   “ make, grant, subscribe, and deliver to the said John  
                   “ West, John Mackie, James Alexander Simpson, and  
                   “ John Dick, and the survivors and survivor of them,  
                   “ and the heirs or assignees of the survivor, and their  
                   “ or his foresaids, all writs, deeds, and conveyances con-  
                   “ taining procuratories of resignation, precepts of sasine,  
                   “ and other usual clauses requisite for fully vesting and  
                   “ establishing the premises in their or his person ; with  
                   “ full power to the said John West, John Mackie,  
                   “ James Alexander Simpson, and John Dick, and the  
                   “ survivors and survivor of them, and the heirs of the  
                   “ survivor, and their or his foresaids, to call and pursue  
                   “ for, uplift, receive, assign, convey, sell, and dispose of,  
                   “ discharge and renounce, the whole of said subjects,  
                   “ heritable and personal, hereby disponded and assigned,  
                   “ and generally to do every thing in relation to the  
                   “ premises which I might have done before granting  
                   “ hereof ; but always to and for the uses, ends, and  
                   “ purposes, and under the declarations specified and

“ contained in my will in the English form already  
 “ executed by me, or to be specified and contained in  
 “ any other will, codicil, or other writing which may  
 “ yet be executed or signed by me, and to all which  
 “ express reference is hereby made; reserving always,  
 “ not only my own life-rent of the subjects, heritable  
 “ and personal, before disposed and assigned, but also  
 “ full power and liberty to me to alter and revoke these  
 “ presents, in whole or in part, as I shall think fit, at  
 “ any time in my life, or even on deathbed—dispensing  
 “ with the not delivery hereof, and declaring these  
 “ presents to be a good, valid, and effectual deed,  
 “ though found lying by me at the time of my death,  
 “ or in the custody of any person to whom I may  
 “ entrust the same undelivered: And I consent to the  
 “ registration hereof in the books of Council and Ses-  
 “ sion, or other Judges books competent, therein to  
 “ remain for preservation; and thereto constitute Sir  
 “ John Hay, advocate, my procurator. In witness  
 “ whereof, these presents, written on stamped paper by  
 “ Adam Pearson, clerk to Alexander Pearson, W. S.,  
 “ are subscribed by me at London the 14th day of  
 “ November in the year 1823, before these witnesses:  
 “ James Stewart Henry, of No. 9, Finsbury Square, in  
 “ the county of Middlesex, gentleman, and George  
 “ Newton Browne, of No. 40, Great Coram Street,  
 “ Russell Square, in the said county of Middlesex,  
 “ gentleman. (Signed) JAMES DICK.—JAS. S. HENRY,  
 “ witness; G. N. BROWNE, witness.”

The will here referred to was afterwards either can-  
 celled or destroyed; and on the 18th of May 1827,  
 Mr. Dick made another will or testament, by which he re-  
 voked all former wills, and gave, devised, and bequeathed

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“ all and every my lands, tenements, and hereditaments,  
 “ money, and securities for money, stock in the public  
 “ funds, goods, chattels, and all other my real and per-  
 “ sonal estate and effects whatsoever and wheresoever,  
 “ not herein-after otherwise disposed of, unto John  
 “ Dick, Esq., a captain in the royal navy, John Mackie,  
 “ of Fenchurch Street, in the city of London, merchant,  
 “ and James Alexander Simpson, of Doughty Street,  
 “ Mecklenburgh Square, in the said county of Middle-  
 “ sex, solicitor, whom I hereby nominate my executors,  
 “ their heirs, executors, administrators, and assigns,  
 “ upon trust,” &c. to pay debts and legacies. “ And as  
 “ to all the rest, residue, and remainder of my property  
 “ whatsoever and wheresoever, I direct my executors to  
 “ pay, assign, and make over the same from time to  
 “ time as the same shall be received or come into pos-  
 “ session, and all interest, dividends, and annual pro-  
 “ duce thereof, in the meantime, to the principals and  
 “ professors for the time being of the King’s and  
 “ Marischall Colleges, Aberdeen, to be by them invested  
 “ in or upon government or heritable security, in their  
 “ names, and with full power to the said principals and  
 “ professors for the time being to vary such securities,  
 “ and to manage the fund hereby directed to be formed,  
 “ in such manner as to them shall seem best. And it  
 “ is my will, that the said principals and professors  
 “ shall pay the interest, dividends, and annual produce  
 “ of such securities, from time to time as the same shall  
 “ become due, to the professors of the faculties of  
 “ arts and divinity in the said colleges for the time  
 “ being, to be by them applied in manner and subject  
 “ to the regulations herein-after mentioned, to the main-  
 “ tenance and assistance of the country parochial

“ schoolmasters as by law established in the three  
 “ counties of Aberdeen, Banff, and Moray, excluding  
 “ the royal burghs; it being my wish to form a fund  
 “ for the benefit of that neglected, though useful class  
 “ of men, and to add to their present very trifling  
 “ salaries. And with regard to the distribution of the  
 “ income arising from the said fund, and to the selec-  
 “ tion of the objects to be benefited thereby, I wish the  
 “ following rules to be observed :—1. That the country  
 “ parochial schoolmasters by law established in the  
 “ three counties of Aberdeen, Banff, and Moray, ex-  
 “ clusive of the royal burghs, shall alone be entitled to  
 “ the benefit of the said fund: 2. That the income  
 “ thereof be applied in such manner as not in any  
 “ manner to relieve the heritors or other persons from  
 “ their legal obligations to support parochial school-  
 “ masters, or to diminish the extent of such support,  
 “ and so as not to interfere with the rights or power of  
 “ heritors and presbyteries over schoolmasters, or the  
 “ schools entrusted to their care, as the same rights or  
 “ powers are by law insured to them: 3. That the said  
 “ professors for the time being shall have full power  
 “ to pay and distribute the income of the said fund  
 “ from time to time to or among all or such one or  
 “ more of the parochial schoolmasters aforesaid, in such  
 “ proportions, and generally to dispose of the said  
 “ income among them, in such manner as to such pro-  
 “ fessors shall seem most likely to encourage active  
 “ schoolmasters, and gradually to elevate the literary  
 “ character of the parochial schoolmasters and schools  
 “ aforesaid; and for these purposes, to increase,  
 “ diminish, or altogether to discontinue the salary or

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“ allowance to be from time to time made to all or any  
 “ of such schoolmasters, without being accountable for  
 “ so doing. And I particularly recommend the said  
 “ professors to pay great attention to the qualifications  
 “ and diligence of the several parochial schoolmasters  
 “ for and in superintending the education of students  
 “ in the said colleges, during the intervals between the  
 “ sessions thereof, and for and in preparing youths for  
 “ the said colleges,—taking care, at the same time, that  
 “ the common branches of education are properly at-  
 “ tended to at the said parochial schools. And in order  
 “ to enable the said professors to perform the several  
 “ trusts aforesaid more easily, I authorise them to  
 “ appoint a proper person from time to time as they  
 “ shall see fit, to act as their clerk, who shall be properly  
 “ qualified, and fully competent to such office, and to  
 “ allow such clerk such a salary as the said professors  
 “ shall think fit, and with power to them to remove any  
 “ such clerk whenever they think proper. And I em-  
 “ power the said professors for the time being to  
 “ manage and dispose of the funds to be paid to them  
 “ generally, in such way as shall seem to them best  
 “ calculated to effect the purposes aforesaid,” &c. “ In  
 “ witness whereof, I, the said James Dick, have, to this  
 “ my last will and testament, and to a duplicate thereof,  
 “ each contained in eight sheets of paper, set my hand  
 “ and seal; that is to say, my hand to the first seven  
 “ sheets, and my hand and seal to this eighth and last  
 “ sheet thereof, this 18th day of May, in the year of  
 “ our Lord 1827.

“ (Signed) JAMES DICK.”

He came to Scotland in the same year; and when

in Aberdeen he there executed, on the 6th of July, a deed, in which, after reciting the provisions in the above will relative to the charitable bequest, he set forth—“ And being desirous, in as far as in me lies, to “ ensure the success of the scheme on which I have so “ resolved, and to render the same as perfect as circumstances will admit of for answering the purposes “ expressed in my said will, and making the residue of “ my estate available in the easiest and simplest way to “ the object of improving the condition of the parochial “ schoolmasters of the counties above mentioned, and “ advancing the interests of literature and general education in these counties, have resolved with that view “ to execute the supplemental deed underwritten, which “ I desire to be taken and held as part of my said will ; “ that is to say, I give, grant, assign, and dispoise to my “ executors aforesaid, viz. the said John Dick, John “ Mackie, and James Alexander Simpson, and the survivors or survivor of them, in trust for the uses, ends, “ and purposes expressed in my last will and testament “ above mentioned, all and sundry lands, heritages, “ debts, sums of money, mortgages, adjudications, bonds, “ heritable and moveable, bills, accounts, and other “ estate, real and personal, of whatever kind, and “ wheresoever situated, which shall belong or be resting “ and owing to me at the time of my decease, together “ with the whole vouchers, evidents, and instructions of “ the same ; and I bind and oblige myself, my heirs “ and successors whomsoever, to make, grant, subscribe, “ and execute all such deeds, instruments, or writings “ as may in any way be requisite or necessary for “ effectually vesting the premises in the persons of my “ said trustees and executors, and rendering complete

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 29th August “ of the said will : But providing always, as it is hereby  
 1833. “ specially provided and declared, that my said will,  
 CAMERON “ jointly with the present supplemental deed, is to be  
 v. “ taken and understood, and carried into effect, with  
 MACKIE “ and under the conditions and qualifications herein-  
 and others. “ after specified ; viz., that my said trustees and execu-  
 “ tors, instead of paying, assigning, and making over  
 “ the residue of my property, with the interest, divi-  
 “ dends, and annual produce thereof, to the principals  
 “ and professors for the time being of the King’s and  
 “ Marischal Colleges, Aberdeen, to be by them invested  
 “ and disposed of in manner directed by the said will,  
 “ shall pay, assign, and make over all the rest, remain-  
 “ der, and residue of my said property whatsoever and  
 “ wheresoever, from time to time as the same shall be  
 “ recovered or come into possession, and all interest,  
 “ dividends, and annual produce thereof, in the mean-  
 “ time to the Reverend Doctor Duncan Mearns, pro-  
 “ fessor of divinity, the Reverend Doctor Patrick  
 “ Forbes, professor of humanity and of chemistry,  
 “ William Paul, professor of natural philosophy, and  
 “ Hercules Scott, professor of moral philosophy, all in  
 “ King’s College, Aberdeen, and to the Reverend  
 “ Doctor George Glennie, professor of moral philo-  
 “ sophy and logic, Doctor James Davidson, professor  
 “ of civil and natural history, Doctor William Knight,  
 “ professor of natural philosophy, and John Cruick-  
 “ shank, assistant professor of mathematics, all in the  
 “ Marischal College, Aberdeen, and to the survivors of  
 “ them, or such persons as shall be chosen to succeed  
 “ them in manner after mentioned, to be by them  
 “ invested in or upon government or heritable securi-

“ ties in their names in trust, to remain under their  
 “ charge as a constant perpetual fund, of which the  
 “ interest, dividends, rents, and other annual income  
 “ or produce shall be paid and applied by them to the  
 “ maintenance and assistance of the country parochial  
 “ schoolmasters as by law established in the counties  
 “ of Aberdeen, Banff, and Moray, excluding the royal  
 “ burghs; but subject always to the rules and regula-  
 “ tions mentioned in my said will, which I hereby ratify  
 “ and confirm, except in so far as the same are con-  
 “ trolled and qualified by the terms of this supplemental  
 “ deed, and subject also to the following conditions  
 “ and regulations, which I have resolved to annex  
 “ thereto.”

He accordingly gave a number of new directions as to the administration of the trust. He did not reserve his life-rent or any power of revocation, nor did he revoke the deed of 1823. The testing clause was in these terms:—“ In witness whereof, these presents, written  
 “ by Duncan Davidson, advocate in Aberdeen, on this  
 “ and the five preceding pages of stamped paper, I have  
 “ subscribed my name, and set my seal, at Aberdeen,  
 “ the 6th day of July in the year 1827, before witnesses;  
 “ viz., Alexander Dick, Esq., residing in Edinburgh;  
 “ John Forbes, son of the said Doctor Patrick Forbes;  
 “ and the said Duncan Davidson. (Signed) JAMES  
 “ DICK.—ALEX. DICK, witness; JOHN FORBES, wit-  
 “ ness; DUNCAN DAVIDSON, witness.

He delivered this deed to Dr. Glennie.

Doubts having occurred, whether, contrary to his intention, Mr. Dick might not, by the execution of the above deed, lose all control over the institution of which he contemplated the establishment, and of the disposal of

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the funds during his life; and being reminded of the general disposition which he had executed in 1823, and which apparently he had forgotten, he caused the deed executed at Aberdeen to be sent to him, and he cancelled it by cutting off his signatures and the seal; and on the 20th November 1827, he executed a codicil in these terms:—“ This is a codicil to the will of me, “ James Dick of Finsbury Square, in the parish of “ St. Luke, Old Street, in the county of Middlesex, “ Esq., which will bears date the 18th day of May 1827. “ Whereas in and by my said will I have directed my “ executors therein named to pay, assign, and make “ over all the residue of my property, subject to the “ bequest therein contained, to the principals and pro- “ fessors for the time being of the King’s and Maris- “ chal Colleges, Aberdeen, to be by them invested as “ therein mentioned, and with directions to the said “ principals and professors to pay the interest and “ annual produce thereof to the professors of the “ faculties of arts and divinity in the said Colleges for “ the time being, upon the trusts therein mentioned, “ for the benefit of the country parochial schoolmasters “ in the three counties of Aberdeen, Banff, and Moray, “ excluding the royal burghs: And whereas I am appre- “ hensive that if the residue of my said property shall “ be paid to the said principals and professors, my “ intentions in favour of the parochial schoolmasters “ aforesaid may be partially frustrated; I do therefore, “ by this codicil to my said will, revoke the said direc- “ tions contained in my will to my executors, to pay the “ residue of my property to the said principals and “ professors, and I revoke and make void all the be- “ quests contained in my said will to them, or in their

“ favour, or to the said professors of the faculties of  
 “ arts and divinity in the said colleges, or in their  
 “ favour; and in lieu thereof, I direct my executors, in  
 “ case I shall not by any deed make such a provision as  
 “ in my will is mentioned for the relief and benefit of  
 “ the country parochial schoolmasters therein specified,  
 “ to see that the directions in favour of the said school-  
 “ masters, contained in my will, are duly carried into  
 “ effect; and for that purpose I authorise and direct  
 “ my said executors to pay, assign, and make over all  
 “ the residue of my property, by my will given to the  
 “ said principals and professors, to such individuals, or  
 “ to such public or corporate body, as in the judgment  
 “ of my said executors, or the survivors or survivor of  
 “ them, or the trustees or trustee for the time being  
 “ under my said will, shall be most likely to carry my  
 “ intentions and trusts, which are fully expressed in my  
 “ will, in favour of the said schoolmasters into effect:  
 “ And for that purpose I authorise and direct my said  
 “ executors, and the survivors and survivor of them, or  
 “ the trustees or trustee for the time being of my said  
 “ will, to execute and to procure such individuals, or  
 “ public or corporate body, to join, if necessary, in  
 “ executing a proper deed of gift or settlement of the  
 “ said residue of my property, upon the several trusts  
 “ and subject to the several directions in my said will  
 “ mentioned in favour of or respecting the country  
 “ parochial schoolmasters, therein specified, and to do  
 “ all acts necessary to give full effect to the said trusts  
 “ and directions, so that the residue of my property  
 “ may be held by the persons or body to be appointed  
 “ trustees thereof, upon the same trusts, and for the  
 “ same purposes, and subject to the same directions in

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 29th August “ nominated trustees thereof in my said will, in lieu of  
 1833. “ the said principals and professors, and the said pro-  
 CAMERON “ fessors of the faculties of arts and divinity, and in all  
 v. “ other respects I confirm my said will. In witness  
 MACKIE “ whereof I, the said James Dick, have to this, a codicil  
 and others. “ to my last will and testament, written and contained  
 “ in one sheet of paper, set my hand and seal, this 20th  
 “ November, in the year of our Lord 1827.

“ (Signed) JAMES DICK.”

He was in the course of getting certain other testamentary deeds prepared in May 1828, when he died on the 24th of that month in London. In October thereafter, the appellant, his grand nephew, was served heir at law to him; and being a pupil, his father as his administrator in law raised before the Court of Session an action of reduction, concluding to have the disposition of November 1823, the will or testament of May, and the codicil of November 1827, set aside, in respect that the disposition did not contain the proper disposing words to import a valid conveyance of real property, per verba de præsenti, and at all events was revoked by the will and testament executed upon the 18th of May 1827, or at least by the deed executed at Aberdeen; that the will and testament executed upon the 18th of May 1827 was destitute of the solemnities and requisites necessary for the conveyance of heritable property and securities in Scotland, and did not apply to any heritable property in Scotland; that, supposing the disposition to stand unrevoked, it was nevertheless void, as it had been granted to persons as executors appointed by a previous existing will, but which had been revoked by the will of 18th May 1827, so that the

office of these executors never came into existence, and therefore the disposition to them ceased to have any effect; and the executors named in the will of May 1827 were not identical with those named in the preceding will, nor with the disponees in the disposition of 1823: that, supposing that disposition were a conveyance de præsentî, and not revoked by the will of May 1827, and supposing that will with the codicil to be the last will and testament of Mr. Dick, the disposition was nevertheless void and inoperative, as no mention is made of it, or of the property described therein, in the will; and that will was insufficient to convey real estate situated in Scotland; and the uses and purposes specified in that will were limited to the property devised thereby, which did not include real property in Scotland.

In defence the trustees pleaded, that the disposition contained proper disposing words, importing a valid conveyance of real property, and was executed with all the solemnities required by law; that it was not revoked by the will, which only revoked all wills previously executed and had no reference to the disposition, which was not a will, but a de præsentî conveyance; that although the will was ineffectual as a conveyance of heritable property in Scotland, yet it was valid as setting forth the testator's directions as to the disposal of his heritable property in Scotland previously conveyed by the disposition, and those directions must be held to be a part of that deed, in the same manner as if they had been engrossed in it; that the words in the disposition which designed the disponees as executors named in the first will were merely descriptive, and that their identity with the executors nominated in the will

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subsequently executed was not essential, although they were, with one exception, the same individuals.

The Lord Ordinary appointed the question to be argued in cases, on advising which he pronounced this interlocutor (11th January 1831):—"The Lord Ordinary, having resumed consideration of the closed record, with the mutual cases now lodged, Finds that the deed of trust executed by James Dick, deceased, according to the forms of the law of Scotland, of date the 14th November 1823, was not revoked by the last will and testament, also executed by the said James Dick, of date the 18th May 1827, or by any other deed, instrument, or act: Finds that the said deed of trust is subsisting, and effectual to convey to the persons therein named, and to the survivors or survivor of them, the whole heritable property of the deceased, situated in Scotland, in which he was vested at the time of his death, subject to the effect of the obligations of trust therein expressed: Finds that, it being admitted that the said last will and testament of date the 18th May 1827, and the codicil of 20th November 1827, executed according to the forms of the law of England, where the testator had his domicile, are in all respects valid and effectual to their purposes under that law, and there being no ground for alleging that there is any technical ambiguity in the terms or clauses thereof, the question as to the effect of the obligations of trust, expressed in the said trust deed, in relation to the testator's property in Scotland, by reference to the purposes specified and contained in a last will previously executed, or to be specified and contained in any will, codicil, or other writing which the testator might

“ afterwards execute in the application of the said ob-  
 “ ligations of trust to the purposes actually specified  
 “ and contained in the said last will and testament of  
 “ the 18th May 1827, and the codicil of the 20th  
 “ November 1827, is a question which must be deter-  
 “ mined exclusively by the law of Scotland: Finds it  
 “ fully settled as a matter of the law of Scotland that  
 “ an heritable estate may be effectually conveyed by a  
 “ trust deed in the form of the trust deed executed by  
 “ James Dick, and that the obligations of trust pro-  
 “ visionally created by reference to any will to be after-  
 “ wards executed may be effectually perfected and de-  
 “ fined by a testamentary deed or will executed  
 “ according to the law of the place where the testator  
 “ is domiciled, though not bearing the forms of the  
 “ law of Scotland: Finds that in this case the pro-  
 “ visions of trust in the trust deed are so laid down and  
 “ expressed as to apply with effect to the purposes  
 “ specified and contained in the said last will and tes-  
 “ tament, and the said codicil, and that there is no in-  
 “ congruity which can prevent such application: There-  
 “ fore sustains the defences, and assoilzies the defenders,  
 “ and decerns, but finds no expenses due.

“ *Note.*—The cases of election quoted by the pursuer as  
 “ being held to depend on the law of England are entirely  
 “ different from this case. In them the question de-  
 “ pended wholly on an English deed, but here the  
 “ operative deed is a Scotch deed; the English deed  
 “ is but incidental to it. And though an English lawyer,  
 “ looking at that deed alone, might very possibly say  
 “ that the purposes expressed do not go beyond the  
 “ property carried by it, he could give no legal opinion  
 “ as to the effect of the trust deed, to extend the opera-

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“ tion of the same purposes to the Scotch heritable  
 “ estate, because that would plainly be to judge of the  
 “ effect, not of the English deed, but of the Scotch  
 “ deed. The questions arising under the law of Scot-  
 “ land from the facts in the record are so clearly treated  
 “ in the cases, and the argument of the defenders ap-  
 “ pears to the Lord Ordinary to be so conclusively sup-  
 “ ported by the authorities referred to, that he thinks it  
 “ unnecessary to express the grounds of his opinion on  
 “ the several points discussed more particularly than  
 “ he has done in the above interlocutor. The way in  
 “ which a title is to be completed, and the testator’s  
 “ design carried into effect, is a matter in which the  
 “ pursuer has no interest, if he cannot reduce the set-  
 “ tlement.”

Against this judgment the appellant reclaimed to the First Division of the Court, who (19th May 1831) adhered, “with this explanation and alteration, that the expenses incurred by the pursuer in this action shall be paid by the defenders out of the trust fund.”\*

Mr. Cameron appealed.

*Appellant.*—1. The first point is, whether a Scotch deed conveying heritage can be revoked by an English deed, or a deed not probative by the law of Scotland. It certainly must appear rather singular, if the law of Scotland were to hold, that an imperfect trust conveyance may be filled up by a deed in the English form, and not probative according to the law of Scotland; and yet that a conveyance of property cannot be revoked in the same manner. But the law appears to be

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\* 9 S. D. B., p. 601.

nearly the reverse ; for while the power of filling up an imperfect Scotch deed by an English will, so as to effect by their union a valid conveyance, is still a point of the greatest doubt, the power of revoking such a conveyance by an English will has long ago been established.\* If, then, a Scotch conveyance of property may be revoked by an English will, the next question is how that will is to be construed. The meaning of the deed is a fact which must be ascertained by the evidence of those who have made that law their study, and are acquainted with its technicalities. Now, the appellant has averred, “ that by the law of England the word ‘ will ’ is not limited “ in its legal meaning to bequests of moveables or personal estate merely, but applies also to a demise or “ settlement, and to instruments by which real as well “ as personal estate passes ; ” consequently when the testator revoked all former wills, the trust conveyance of 1823 must be held to be included under that revocation. It has been said that the same point had previously occurred in the case of *Fordyce against Cockburn* †, and that of *Brack against Hogg* ‡, in both of which the Court held that a revocation of former wills did not recal a previous trust disposition of heritage. But there are two important points of distinction between these cases and the present. For here, after revoking all former wills, the will proceeds to appoint a series of trustees, different from those under the deed of 1823, and with different powers, so that that previous deed must have been held superseded by the will ; and in

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\* *Simpson v. Barclay*, December 11, 1751, *Elchies voce Testament*, *Mor.* 15585 ; *Lang v. Whitelaw*, *Shaw, Appeal Cases*, vol. ii. p. 13, note.

† July 5, 1827, *Shaw & Dunlop*, vol. v. p. 897, new ed. 832.

‡ Nov. 23, 1827, *Shaw & Dunlop*, vol. vi. p. 113, ante v. 61.



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the cases of Fordyce and Brack no new deed was contemplated or executed when the revocation in the will was made. Consequently if the revocation had been held to apply to the previous trust deed, while the testator never went on to execute any new one, he must be supposed to have committed the absurdity of frustrating his own object, and leaving his property undisposed of. Influenced by that consideration, the Court certainly did hold, in these cases, that the testator could not have intended to revoke the trust deed. But here, after the revocation of former wills, Mr. Dick instantly executed and delivered a new trust conveyance of the very same property in favour of different individuals from those to whom the first disposition was made. When a testator follows up his revocation by the execution of a new deed, his intention must be supposed to have been to alter some of the particulars of the previous conveyance, which would of course be done most clearly and satisfactorily by a new deed. And therefore, as the same grounds do not exist here which existed in the cases of Fordyce and Brack for limiting the meaning of the word, it must be entitled to receive the usual construction which it bears in the law of England, and according to which it would include the trust disposition of the property in Scotland. Nay, the execution of the supplemental deed must, per se, be held to operate a virtual revocation of the former disposition; for though it is at an end, as a regulating conveyance of Mr. Dick's property, the facts relative to its execution and its delivery are of material importance, both in reference to the question of revocation, and to the ulterior question, whether the will is to be considered as filling up and declaring the purposes

of the trust deed. By this supplemental deed, the same subjects which had been disposed to the respondents were transferred to individuals who were not identical with the previous trustees. It superseded the trust deed of 1823; and had it never been cancelled, there could not have been a question that, taken along with the will to which it bore express reference, it would have been the regulating settlement of Mr. Dick. But though the supplemental deed was cancelled by Mr. Dick it by no means follows that the effect of its being so cancelled was to revive the first.\* It is true that in the ordinary case, where a person who has indirectly revoked one deed by the execution of another afterwards destroys the deed containing the revocation, and stops there, the presumption will be that he intended to rear up the first; but if it be apparent that he merely destroyed the deed as a preliminary to the execution of another, different from both, then the first deed will not come into operation.† Now, here the cancellation of the supplemental deed was done, not with the view of rearing up the deed of 1823, but as a step to the preparation of a new series of deeds.

2. But, supposing the disposition of 1823 not to have been revoked, it is void in respect of having been granted to the donees therein named, and the survivor of them, as the executors of a will previously executed, and as the office so conferred, and in contemplation of which the disposition was granted, never came to exist in their persons,

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\* *Muir v. Muir*, June 1, 1813, *Fac. Coll.*

† *Müller Promptuarium Juris*, vol. vii. p. 426; *Voet*, lib. 27. tit. 3. sec. 5; *Vinnius*, *Inst. lib. ii. tit. 18. sec. 6*; Lord Meadowbank's opinion in *Howden v. Howden*, July 8, 1815, *Fac. Coll.*

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that will having been revoked by the will of the 18th of May 1827. The parties named as trustees are not the same with those who are ultimately named as executors under the only existing settlement of Mr. Dick. The name of Mr. West is entirely omitted in the English will, although Mr. West was alive at the date of its execution, and is alive still; and the provision relative to the appointment of new trustees, in the event of death or declinature to act, is different under the will from that under the trust deed. It is true that Mr. Dick would have been entitled to have named as his trustees any individuals designed as executors even under the will of another party, if he had so seen fit; but the objection is, not that Mr. Dick might not have named trustees who were not his executors, but that in point of fact he did not mean them to act as his trustees unless they were also his executors. Neither in *Auchterlony's case\**, nor in *Fordyce's*, nor *Brack's*, was the disposition to the trustees made to them as executors. The intention of Mr. Dick was, that the existence of the trust in favour of the respondents was conditional on their being the executors who should act under his English will; for had Mr. Dick died after destroying the original will, which preceded the trust deed, without naming any executors by whom the purposes of his will were to be fulfilled, the trust could not have stood.

3. It was incompetent for Mr. Dick, by a deed executed in the form of an English will, and improbativ according to the law of Scotland, to fill up and declare the

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\* *Willoch v. Auchterlony*, Dec. 16, 1769, M. 5539.

purposes of the trust conveyance which he had granted of his heritable property in Scotland; and at all events he could not, by such a will, nominate new trustees. But granting that it was competent for Mr. Dick to do so, the question remains, has he done so? and how is the legal meaning of this will to be gathered? Being an English deed it must be judged of by Scotch Courts according to the law of England alone. This principle has long been fixed by various cases in questions of election, where the point was, whether or not the terms of an English will were such as to put the heir to his election.\* Now the appellant has offered to prove, that the “last will and codicil do not contain any instructions relative to the disposal of the property attempted to be conveyed by the trust deed of 1823, nor any expressions importing that the directions contained in the said instrument should be applicable to Scotch property; and the same would not, by the law of England, be held to express any intention whatever as to the heritable property in Scotland, or to contain any instructions in regard to such property.” Besides, this case is distinguished by the specialty, that there is no reference in the one deed to the other. Thus, in the case of *Wilson Bowman*†, reversed in this House (29th May 1802), where, among other questions, the point arose, whether a reserved power of nomination contained in a deed of entail had been duly exercised by *Walter Bowman* or not, Lord Thurlow laid down this doctrine:—

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\* *Robertson*, Feb. 16, 1816, *Fac. Coll.*; *Trotter v. Trotter*, Dec. 5, 1826, affirmed on appeal; 5 S. D., p. 78, new ed. p. 72, June 10, 1829, ante iii. 407.

† *Henderson v. Wilson*, Jan. 31, 1797, *Mor.* 15444.

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“ There is indeed,” he observes, “ a power of nomination contained in the deed 1757, which Walter Bowman might have exercised by an accessory deed, but to have done so he must have referred to the original instrument under which he exercised that power. Here there is no such reference to the deed of 1757 to render it effectual, even supposing the reservation gave a power to engraft a new succession by a relative instrument.” Had Mr. Dick intended that the purposes of the English will should be those which he had reserved to himself power to declare, in relation to the trust conveyance, he would have referred expressly to that conveyance as previously executed by him, and declared that the purposes it contained should apply, not only to the English property carried by it, but to the Scotch heritage also, which formed the subject of the previous and separate conveyance. Such was the manner in which he did act on another occasion; for when he came to frame the supplemental deed he expressly narrated the will he had already executed, and declared that its directions should be also the directions according to which his Scotch property conveyed by the supplemental deed should be distributed and managed. At all events, whether a reference in express terms to the trust deed was necessary or not, it is clear that Mr. Dick, having reserved the power of declaring the purposes of his Scotch trust by his English will, it lies with the respondents, who say that these purposes are declared by that will, to show what expressions in that instrument are applicable to Scotch property, or bear reference to the subjects conveyed by the trust deed. The cases of *Fordyce*, *Brack*, and *Lady Essex’s* trustees, which were founded on by them, rather tend

to confirm than to shake the principles for which the appellant contends. It is true that it may perhaps be held that these cases establish the point that the purposes of the trust deed might have been declared by Mr. Dick in his English will; but they also, by implication, establish that there must be a reference in the will to the trust deed, or at least such expressions as clearly show that the purposes in the will apply to the same property which was conveyed by the trust deed. Neither does the case of Auchterlony support the respondents argument, for the only question really argued in that case was, whether the purposes of the trust deed could at all be declared by the will? No argument was raised as to whether the will was intended to declare the purposes of the trust or not. And instead of being made, like the will in question, at the distance of years from the date of the trust disposition, and when the granter had forgotten it, the will was executed within a month of it, and the property conveyed by the trust disposition, and that with regard to which the will declared the intentions of the testator, were coincident; for it does not appear that he had any English property, so as to complicate the question, or to create a doubt what were the purposes referred to.

*Respondents.*—1. The question whether a Scotch deed conveying heritage in Scotland has or has not been revoked by an instrument sufficient to produce that effect, must be determined by the rules of the Scotch law. For it is established law, that in regard to the form of conveyances of real property, as well as of revocations of such conveyances, the *lex rei sitæ* must govern.

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The case of *Simpson v. Barclay*\* is by no means hostile to this doctrine. The testator made an entail by a deed containing a power to revoke. He afterwards, while at Buenos Ayres, and in a situation where "he had no lawyer to advise him better," executed a will, which revoked the deed of entail, and then bequeathed the estate to his sister. This will must have been holograph, and therefore probative by the law of Scotland, because the testator had no one to assist or advise him about it. As a revocation of the entail, therefore, it was quite unexceptionable. In the case of *Dundas v. Dundas* † the Court of Session held that a Scotch deed of entail was revoked by a subsequent English will; but this House ‡ "ordered and adjudged that the interlocutor complained of be reversed, in so far as it finds that the deed of entail libelled on is effectually revoked by the deed executed by Sir Laurence Dundas on the 14th February 1779." In the case of *Wilson* § the Court of Session laid it down as a principle that a regular entail could be revoked by a subsequent procuratory and will, both of which were destitute of the solemnities required by the law of Scotland, in respect they were "formally executed according to the *lex loci*, although not according to the solemnities of the law of Scotland;" but this House || reversed, and found that the succession fell to be governed by the deed of

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\* *Simpson v. Barclay*, 10th January 1752, *Elchies voce Testament*, No. 12.

† *Dundas v. Dundas*, 25th February 1783, *Mor.* p. 15585.

‡ May 21, 1783.

§ *Henderson v. Wilson*, 31st January 1797, *Mor.* p. 15444.

|| May 29, 1802, *Morison, App., Tailzie*, No. 3.

entail. The cases of *Fordyce v. Cockburn* and of *Brack v. Hogg* establish the proposition contended for by the respondents; and accordingly, in *Lang v. Whitelaw*, Lord President Blair observed,—“ We must therefore “ come ultimately to the doctrine already considered, “ that by the law of Scotland deeds of revocation are “ exempted from the statutory solemnities; and I do not “ think this doctrine well founded.” The appellant has observed, that in those cases no new deed was executed when the revocation was made; whereas Mr. Dick, after revoking all former wills, executed and delivered a new trust conveyance of the same property, in favour of different individuals from those to whom the first disposition was made. There is, however, no such distinction in law as that pointed at by the appellant; and the fact is, that although Mr. Dick at one time intended to alter the machinery by which he wished to accomplish his purpose, the deed executed at Aberdeen was meant to carry that purpose into execution. The question, whether a man intends to revoke a deed, cannot be solved by inquiring whether he has substituted any other deed in its place; for it is just as likely that an intention to revoke a settlement may be attended with a design to die intestate, as with a design to execute a new settlement. A strong example of this occurs in those cases where the heir at law seeks to set aside a liege poustie disposition executed to his prejudice, by means of a subsequent death-bed disposition of the same subject, also to his prejudice. In such cases, the plea of the heir is, that the liege poustie disposition is revoked by the death-bed deed, whilst the death-bed deed is insufficient to constitute a new disposition to his prejudice;

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that the death-bed deed is valid to the effect of revoking the other; but that, quoad ultra, it is ineffectual. Now, here the success of the heir at law entirely depends upon the distinction in question. If the death-bed deed contain an express revocation of the other, it is held that this revocation may take effect, whilst the new disposition contained in the same instrument is ineffectual. So it was found in the noted case of Crawford v. Coutts\*, which has been followed by the decision in Batlay v. Small† and other cases. On the other hand, if the death-bed deed contain no express revocation of the former, it cannot operate as a revocation, unless by constituting in itself a new and effectual conveyance. And thus, as the heir cannot set aside the one deed without admitting the validity of the other, his interest to challenge either is cut off.‡

2. The appellant has argued that the deed of 1823 is void, in respect the trustees are described as the executors appointed by the previous English will, which will was afterwards revoked; that, the office of executor under that will having thus never come into operation, the description under which they were appointed trustees was incorrect; and that the executors appointed by the last will and codicil, are not the same persons with the trustees nominated by the deed of 1823. It is true that the trustees are described as executors, and the de-

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\* Crawford v. Coutts, 3d Feb. 1801, Mor. No. 3, Apx. Death-bed, remitted 14th March 1806, 12 Fac. Col. note.

† Batlay v. Small, 2d February 1815, Fac. Col.

‡ Rowan v. Alexander, 22d November 1775, Mor. 11371; Donaldson v. Mackenzie, 20th July 1776; Roxburgh, 13th December 1816, affirmed 25th May 1820, Bligh's Reports, vol. ii. p. 619; Toller's Law of Executors, p. 15, 6th edit.

scription at the time was perfectly correct, so far as it went; but the trustees were otherwise sufficiently designed, so as to ascertain their identity. Mr. Dick did not provide that the office of trustee under the one deed was to depend upon the subsistence of the other; on the contrary, he anticipated that the will might be altered or revoked by a subsequent will, whilst the trust deed remained permanent and capable of connecting with each successive will that he might happen to make. In the case of *Fordyce v. Cockburn* the circumstances were precisely the same in regard to this objection: The trustees had been previously appointed executors under a will which was afterwards revoked, and were expressly so designed in the trust deed; yet no serious objection seems ever to have been founded upon this circumstance. Indeed it was not necessary that the trustees under the Scotch deed should be the same persons as the executors under the latter will of 1827. The purposes of both deeds being the same, it might no doubt be necessary that the trustees and executors should act in concert; but the estates which they had to administer were different, and therefore there would have been nothing anomalous in the Scotch trustees being different from the English executors. But in fact the accepting trustees are here identically the same persons as the executors nominated by his latter will: the defenders, who are three in number, are the executors under the latter will, and they are also trustees under the deed of 1823. Mr. West, who was the fourth trustee, had probably intimated to the testator his resolution to decline the office, which accounts for his not being appointed an executor along with the defenders.

3. It is not seriously disputed, that by the law of Scot-

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land it is competent to declare the uses and purposes of a trust deed relative to Scotch heritage by an English will, or other writing probative by the law of the country in which it is framed, although improbative by the law of Scotland. This general point is now finally settled by the cases of *Willoch v. Auchterlony*, *Fordyce v. Cockburn*, *Brack v. Hog*, and of *Ker v. Ker's Trustees*. But it is said that there is no sufficient connexion between the deed of 1823 and the will of 1827, and no such reference from the one to the other as to prove that Mr. Dick intended the uses and purposes set forth in the will to be extended to the Scotch property carried by the deed of 1823. It is clearly proved by the correspondence that Mr. Dick's sole purpose in framing the trust deed was to give him the power of disposing of his Scotch heritage by will; and that with this view it was so drawn up as to refer to any subsequent will, as well as the will he had previously executed. His intentions therefore are beyond doubt. But farther it is not necessary by the law of Scotland that, between deeds intended to form parts of one general settlement, there should be a distinct and separate reference in each to the other, or that the later deed should specially refer to the former. It is quite enough, if between the two there exist such a connexion, even although constituted by the words of one of the deeds only, as sufficiently ascertains the granter's intention. This is sanctioned by all the cases which have occurred upon this subject; and particularly by that of *Willoch v. Auchterlony*\*, which is the leading authority upon this point. But the appellant

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\* *Willoch v. Auchterlony*, 14th December 1769, Mor. p. 5539.

contends, that this question of reference ought to be determined by the law of England. For that purpose, both the Scotch and English deeds would require to be laid before counsel, so that their opinion would not rest on the English deed alone, but on a consideration of the two deeds. If there were any technical expressions contained in the English deed which required to be explained to a Scotch Court, it might be proper to take the opinion of English counsel; or if there were any expressions in the will which, when duly explained by English counsel, were considered as worthy of being taken into account by this Court in determining the question of reference, it might be reasonable to state this as an element to guide the decision. But this is very different from holding that the question of reference itself is to be delegated to English lawyers. The question of reference occurs upon the construction of the Scotch trust deed,—upon the construction of the clauses of reference contained in that deed. The discussion arises as to the disposal of Scotch heritable property, and resolves into this inquiry, whether the Scotch deed has been completed and rendered effectual by the execution of a declaration of uses and purposes, such as it contemplates and refers to? This is purely a Scotch question, and is altogether different from questions of election. In all such cases, the point at issue is with regard to the intention of the testator, as ascertained by the expressions contained in a particular deed. And where that deed is an English deed, drawn up in the English form, and replete with the technicalities of English law, it has justly been held that such deed shall be construed by the law of England. But these cases do not bear any analogy to the present. Here the question occurs on

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the construction of a Scotch deed. And although an English deed is referred to, still the particular contents and intentions of the testator, as developed in the English deed, are of little or no consequence in the question of reference, it being admitted in general that it is a will, and a will clearly declaring purposes.

LORD CHANCELLOR.—My Lords, this was an appeal from the Court of Session, in which Patrick Cameron, for his infant son, George Fenton Cameron, is the appellant, and John Mackie and others, trustees under the deed and will of the late James Dick, Esq., of Finsbury Square, London, are the respondents. James Dick, by a trust deed executed in England on the 14th of November 1823, but in the Scotch form, in the Scotch language, and upon Scotch property, and the provisions of which were entirely Scotch, vested his estates in trustees, according to the Scotch law, but always to and for the uses, ends, and purposes, and under the declarations, specified and contained in his will in the English form, already executed by him, or to be specified and contained in any other will, codicil, or other writing which might yet be executed or signed by him, and to all which express reference was thereby made. He had at that time, as he states, executed a will in England, but that will was subsequently cancelled, and no evidence or information whatever remains of the contents of it, supposing we were at liberty to go into it. But he afterwards made and published his will in England, according to the English form, and attested in such manner as to pass English real estates, on the 18th of May 1827; and by that will he gave, devised, and bequeathed all and every

his lands, tenements, and hereditaments, money, and securities for money, stock in the public funds, and so on, to trustees; and then he directed those trustees to call in all his debts, and to convert into money all that was not in money; and then he gave, after certain legacies, the rest, residue, and remainder of his property, whatsoever and wheresoever, to those trustees, with a direction to pay it over to the principals and professors of the two colleges of Aberdeen, for the purpose of their vesting it in certain of the professors of that university, in order to their applying it towards the increase of the stipends of the “parochial school-  
 “masters by law established in the three counties of  
 “Aberdeen, Banff, and Moray, exclusive of the royal  
 “burghs,” and that these alone should be entitled to the benefit of the fund. He then directed that the income so to be applied should not in any manner relieve the heritors or other persons from their legal obligations to support parochial schoolmasters, or to diminish the extent of such support, or interfere with the rights and powers of heritors and presbyteries over schoolmasters, or the schools intrusted to their care, as the same rights and powers are by law secured to them. He then gave a power—a very necessary power, after making such a provision for the parochial schoolmasters—a power to the professors for the time being to pay those schoolmasters, in such a manner as to them shall seem most likely to encourage active schoolmasters, and elevate the character of the schoolmasters and the schools; and for those purposes to increase, diminish, or discontinue the salary or allowance to be made to all or any of such schoolmasters, without being accountable for so doing. He then directed that the professors

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should manage and dispose of the funds to be paid to them generally, in such way as should seem to them best calculated to effect the purposes which he had stated. He afterwards, by a codicil in November 1827, the same year, altered that disposition, only so far as regarded the persons who were to have the management and superintendence of this fund for the parochial schoolmasters, by substituting his executors in the place of the College of Aberdeen; and the question is, Whether the provisions contained in this English will can be taken to bear reference to the trust disposition in the Scotch form, executed some years before, so as to pass the Scotch estates to those trustees, subject to the trust for the benefit of the parochial schoolmasters?

My Lords, this case was very fully argued upon two occasions before your Lordships, and on one of those occasions your Lordships had the benefit of the assistance of two of the learned Judges of this country, for the purpose of ascertaining, if need be, the effect of this English will upon English property, supposing English property to have been the matter in question, and supposing one of the points raised in the Court below to be, whether or not the English law would affect this question of the execution as to the Scotch property? I was very clearly of opinion, and in that I had the concurrence of those two learned Judges entirely, that in this case the English law can have no bearing whatever upon the question,—that it is a question touching Scotch real estate alone; that the Scotch law alone must regulate the disposition of that real estate in Scotland; and that it does not signify at all to the decision of the present question, to inquire what would be the effect of the English will upon an

English power, given in an English deed, made as affecting English property, if that had been the question in this case. The point then for the consideration of your Lordships is simply reduced to this, Whether or not the Court below have well decided in coming to the opinion, that the English will executes the power,—what is called in the Scotch law the reserved faculty,—given or created by the trust disposition that passes to the trustees the Scotch estates to the uses pointed out in the will, namely, the support of the parish schoolmasters in the three counties; and I am of opinion, after the best attention I have been able to give to the subject, upon both the arguments at the bar, which were very able and very learned, that the Court below, in affirming the interlocutor of Lord Moncreiff, who appears to have bestowed extraordinary attention upon this question,—an attention well warranted by the great importance of the case in point of principle, as well as in respect of the amount of the estate,—that the Court of Session, in affirming the Lord Ordinary's interlocutor, have come to a right decision.

My Lords, as I entertained some doubt of this originally, and as I felt a very great and natural reluctance to affirm this decision, I thought it fit to postpone this case, for the purpose of further consideration, before finally disposing of the question,—being willing, if I could see any means of reconciling the contrary judgments in the Courts of Scotland, and the facts of the case, to take advantage of that circumstance. This reluctance, I have no doubt, was amply shared by the Court below; and it is grounded upon this, that there is nothing peculiarly judicious in the disposition in question, of this property. The burghs of Scotland are exempted from the bounty

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of this testator altogether. His object is to encourage parish schoolmasters, although it is perfectly well known that the want of a sufficient number of endowed parish schools is beyond all comparison greater in the towns of Scotland than in the country villages, as it is greater in the towns than in the country villages here; and yet he excludes by his will all those burgh schools and schoolmasters, which ought, if his will had been judicious for his own purposes, to have been the principal objects of his bounty. Again, notwithstanding the guards and checks he has appointed, by the powers vested in those who are to execute his intention in distributing the fund among the schoolmasters, it is quite clear that the tendency of this will and this trust disposition, when carried into effect, must be in a great degree to frustrate his own object, and that in two ways: In the first place, by providing so well for those schoolmasters, as to make them less dependent on their own exertions than might be desirable; and, in the next place, to relieve the heritors of the parishes from the burdens which he feels peculiarly anxious to leave upon them. The tendency of this disposition unquestionably is, to relieve the heritors of those parishes, and to take upon himself, or upon his estate, at the expense of his own relations, those burdens in respect of parochial schools. Another ground of that reluctance is this—a more general one than the former,—that I have always been of opinion, that where a person leaves relations, it is infinitely better that they should be made sharers in his property, than that it should go, however well meant, and however usefully, to many public purposes. Nevertheless, I have found, as the Lord Ordinary and the Court of Session found before me, that the law in this

case is too strong to be got rid of, and that, by the law of Scotland, this will be a sufficient execution of the power or sufficient declaration of the uses, whichever way you take it, in the trust deed; and that, accordingly, it must have the effect which has been given to it below.

The difference between the law of Scotland and the law of England, as to the execution of powers, is very great. Not only the principles whereupon that branch of the law rests in the two countries are not the same, but the principles on which the Scotch law appears to rest may be said, in some respects, to be opposed to those which are the basis of the English law in this branch. By our law, if there is a power, and a question arises whether an instrument has executed that power, it is necessary that the party maintaining the affirmative should make it appear that the intent of the party making the deed, will, or other instrument, which is alleged to be an execution, was to execute the power. In the Scotch law the reverse is the case; and unless it shall be shown that it was not his intention to execute the power, it shall be held a good execution. Here the burden of proof is thrown upon him who would support the execution,—there, the proof is rather thrown upon him who would deny the execution. In either case, I need hardly add, that the evidence is to be collected from within the instruments themselves; but the proof from the internal evidence of those instruments is thrown upon different parties in the two countries. Thus, although the rule is not with us that it is necessary that the instrument alleged to prove the execution should refer directly and explicitly to the instrument creating the power, nor that it should refer expressly to

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the property which is the subject of its provisions, yet if there be no such distinct references there must be some other means of connecting the two instruments together ; if neither the power itself, nor the property or rights which are the subject matter of the power, are referred to, then there must be something in the instrument executed, which shows clearly, that unless it is held to be an execution of the power, such instrument will be inoperative. The rule has been laid down in the leading case of *Andrews v. Emmott*, 2d Brown's Chancery Cases, and subsequently by Lord Alvanley, in commenting upon that case in *Hales v. Margerum*, 3d Vesey, junior. Lord Thurlow says, in the former case, " If a man disposes of that over which he has a power, " in such a manner that it is impossible to impute to " him any other intention than that of executing the " power, the act done shall be an execution of the " power ;"—and Lord Alvanley, in *Hales v. Margerum*, commenting upon *Andrews v. Emmott*, says, " There " must be either a direct reference to it, or a clear " reference to the subject, or something upon the " face of the will, or independent of it, some circum- " stance which shows that the testator could not have " made that disposition, without having intended to " comprehend the subject of his power." Now, in Scotland, it is quite different ; for it should rather seem, that unless there be something in the instrument purporting to be an execution of the power, which shows that it cannot have been intended by the party to execute that power, if you produce an instrument, and if the instrument may apply to the power, so as to be an execution of it, then it shall be a good execution. The rule may be more generally laid down thus: That by

the Scotch law there is no technical principle—no line distinctly drawn to guide the Court in ascertaining what was the intent of the party, in the instrument alleged to be the execution, but you are to gather it in every way in which you can from the instrument itself; and if it may apply to the power, then it shall be considered to be an execution of it. It is hardly necessary, in this case, however, to go so far; for I agree with the Court below in thinking, that there is in this instrument sufficient internal evidence to bring it almost—certainly not altogether, but, if not altogether, almost—within the English rule; at least, nearer to this rule than at first sight might appear. The difference which is taken between real and personal property in this branch of our English jurisprudence exists not in the law of Scotland. Here a general devise of real estate, as will be found in *Standen v. Standen*, 2d Vesey, junior, 589, and which has been the law ever since Sir Edward Clare's case, in 6th Coke's Reports, will not dispose of what the party has only a power to dispose of, unless it is necessary to satisfy the words of the disposition, but it will execute the power, if there is no other real estate; but otherwise, with respect to personalty, which is a peculiarity of our law, introduced by the language of the statute of Harry the Eighth, the statute of Wills, which only operates upon that which is the property of the devisor at the time of making the devise.

Now, my Lords, a very important matter of fact has been left undecided, and apparently uninquired into in the Court below, namely, Whether or not there was in fact any other real estate than the Scotch estate belonging to the testator, either at the date of the trust instrument, or at the date of the will? One of the learned

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Judges, on the second argument, here called the attention of your Lordships to the second article of the condescence, folio 6 of the appellant's case, by which it is averred, that "the said James Dick was possessed of large property, heritable and moveable, both in England and Scotland;" and that in the answer is admitted,—for the answer admits the whole of the second part of the condescence, except the concluding paragraph; but then there is something vague in this phraseology, and it is very possible that, reddendo singula singulis, it might be intended, and might be so taken by the pleader of the other party in his answer, that the heritable property was only in Scotland, though in England he had moveable—though the presumption would be from the words, that he had heritable property, that is, real estate, in both countries. I understand, however, there is no doubt whatever—and that seemed to be admitted at the bar—that he had real estate in Scotland, and nowhere else; if so, the execution of the power would, even according to the strict principles of the English law, under the authority of *Standen v. Standen*, and other cases, be made out sufficiently by the second instrument; but, in either view, I am of opinion that even if he had real estate out of Scotland, according to the principles of the Scotch law, the will would pass that real estate to the trustees.

The case of *Willoch v. Auchterlony* was very much relied on by the respondents; and it was principally with a view to that case that the second argument was originally ordered, though it afterwards took a wider scope. Two points were to be ascertained; first, the authority due to that case, and whether it had ever been shaken; and, secondly, its application to the present question.

Upon both these points, after a full argument at your Lordships bar, I have no doubt—and the learned Judges, the benefit of whose assistance we had, agreed with me in the view I have taken—first, that that case is still the law of Scotland upon the subject,—that it had been acted upon ever since, and that its authority has been recognized repeatedly in subsequent cases by the Judges in the Scotch Courts; secondly, that the case is applicable to the present in a remarkable degree, even down to some of the minuter details of both cases; and that it makes the law of Scotland, or at least declares the law of Scotland, with sufficient distinctness to form a perfect ground-work for the decision of the case at the bar.

My Lords, upon these grounds, I have no hesitation in recommending to your Lordships, that the interlocutors complained of should be affirmed; but for reasons which are obvious without being referred to, that no costs of the appeal should be paid, in this case, by the party against whom your Lordships decide; on the contrary, that your Lordships should affirm, among other parts of the judgment below, that part of the interlocutor of the Inner House by which they varied the Lord Ordinary's interlocutor, and threw upon the fund the costs of the proceedings up to that time; to which I shall beg leave now to add this further proposition,—that all the costs of the appeal—all the costs both here and below, as between solicitor and client, meaning, in the most ample form, and to the greatest extent in which those costs can, quasi costs, be given, shall be paid out of this fund.

The House of Lords ordered and adjudged, That the interlocutors, so far as complained of, be affirmed: And it

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is declared, That the full and whole charges and expenses of all parties of the proceedings in the Court of Session and in this appeal shall be paid by the respondents out of the trust funds: And it is further ordered, That the cause be remitted back to the said First Division of the Court of Session to ascertain the amount of such charges and expenses respectively, and to give directions for the payment thereof.

A. and R. MUNDELL—SPOTTISWOODE and ROBERTSON,  
Solicitors.

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CHARLES FERRIER, Trustee upon the Estate of JOHN WHITE, Appellant. No. 8.

WILLIAM MOUBRAY and others, Trustees of PETER WOOD, and Mrs. VEITCH, Respondents.

*Process—Appeal.*—Circumstances under which an appeal against an interlocutor, which was not a final judgment, and was pronounced unanimously, and no leave to appeal had been obtained, was dismissed as incompetent.

*Process—Ranking and Sale.*—Held (affirming the judgment of the Court of Session) competent to grant interim warrant on a judicial factor, for payment of a preferable annuity out of the arrested rents of lands, the subject of a ranking and sale, before any common agent was appointed, or a state of the debts made up, or a proof of rental taken.

*Sasine.*—A crown charter of resignation in favour of a series of heirs of entail contained a clause of dispensation in favour of the heirs, for taking infestment in diverse lands at the principal manor place ;—Held (affirming the judgment of the Court of Session) to warrant an heir in possession to grant an heritable bond of annuity with a similar dispensation.

NICOL GRAHAM of Gartmore executed, on the 2d of March 1767, a deed of entail of that estate, under which Robert Graham succeeded. He made up titles under the entail, and expedite a crown charter of resignation, dated 20th December 1779, which contained a clause of union and dispensation in the following terms :—“ Et  
 “ præterea nos cum avisamento, et consensu prædict.  
 “ volumus, et concedimus, et pro nobis nostrisque regiis

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“ successoribus decernimus et declaramus quod unica  
 “ sasina nunc per dictum Robertum Graham, et omni  
 “ tempore futuro suscipienda per prædict. hæredes tal-  
 “ liæ apud manerii locum de Gartmore vel super ulla  
 “ parte fundi dict. diversarum terrarum, baroniarum,  
 “ aliorumque per traditionem terræ et lapidis solum-  
 “ modo.” On his death he was succeeded by William  
 Cunninghame Cunninghame Graham; and in virtue of  
 the charter he was infest on the 6th of November 1799,  
 and the instrument recorded on the 1st of January 1800.

In 1810 Sir John Lowther Johnstone became in-  
 debted to W. C. C. Graham in 2,000*l.*, and granted  
 to him two English penal bonds for 2,000*l.* each, re-  
 deemable on payment of the 2,000*l.* Graham assigned  
 them, in 1811, to John White, merchant in Edinburgh,  
 with warrandice from fact and deed. On the death  
 of Sir John Lowther, his trustees refused to pay the  
 debt, on the ground that it arose out of a gambling  
 transaction; and in resisting payment they were suc-  
 cessful. White then instituted an action against  
 Graham to make payment of the 2,000*l.*; and as White  
 was not proved to have been in the knowledge of the  
 true nature of the debt, he got decree.\* On the  
 dependence of this action White executed inhibition.

Thereafter, on 9th August 1819, Henry Wood  
 advanced to Graham 13,000*l.*, and Graham granted to  
 him an heritable bond of annuity of 1,352*l.* 12*s.* 6*d.*  
 payable out of the barony of Gartmore and other lands  
 half yearly, redeemable on repayment of the 13,000*l.*  
 It contained a disposition of his interest as an heir of  
 entail, an assignation to the rents, and a precept of  
 sasine, in these terms:—“ That on sight hereof ye pass

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\* See 5 S. & D., p. 40 (new ed. p. 38).

“ to the manor place of Gartmore, or to the ground of  
 “ any part of the lands and others foresaid, by virtue  
 “ of the clause of dispensation contained in the foresaid  
 “ charter of resignation, in favour of the said deceased  
 “ Robert Graham, and there give and deliver heritable  
 “ state and sasine, real, actual, and corporal possession  
 “ to the said Henry Wood, or his foresaids, of the said  
 “ annuity,” &c. Infestment was taken on the 16th of  
 October 1829, and the instrument set forth:—“ Which  
 “ sasine the said bailie gave, by delivering to the said  
 “ attorney, for and in name of the said Henry Wood,  
 “ earth and stone of and upon the ground of the said  
 “ manor place of Gartmore, by virtue of the clause of  
 “ dispensation contained in the charter of resignation  
 “ in favour of the said Robert Graham before men-  
 “ tioned, and that for the said lands and other heri-  
 “ tages particularly herein-before described themselves.”  
 Thereafter the inhibition was renounced, in so far as  
 affected this bond.

In 1825 Henry Wood assigned this bond to Peter Wood to the extent of 936*l.* 8*s.* 8*d.*, and to John Veitch to the extent of 416*l.* 3*s.* 10*d.*, and they were infest on the 1st of September. In 1826 Graham became bankrupt, and executed a conveyance of his estate in favour of trustees for behoof of his creditors. By those trustees the annuity was for some time regularly paid; and thereafter the bond-holders raised and executed an action of mails and duties. On the death of these bond-holders, the present respondents, as their respective testamentary trustees, made up titles to the bond, and were infest. Thereafter, the appellant, as trustee on the sequestrated estate of White, obtained, in 1831, a decree of adjudication of the barony

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of Gartmore and others, subject to the usual declaration in adjudging entailed estates.

Founding on this adjudication, the appellant raised a summons of ranking and sale, in which he concluded for sale in the same terms as if the lands had not been at all affected by an entail.

In the meanwhile, Graham's creditors had instituted an action to have it found that the entail was ineffectual; and his son had raised an action of forfeiture, on the ground of contravention of the entail. The Court had also sequestrated the lands, and appointed a judicial factor.

The respondents lodged defences to the summons of ranking and sale, maintaining that it was premature, until it should be decided whether the lands were held in fee simple, or under the entail.

Lord Medwyn repelled the defences; but the Court pronounced this interlocutor on the 2d of June 1832: —“ The Lords having considered this reclaiming note, “ with the proceedings, and heard counsel thereon, remit “ to the Lord Ordinary to sist further procedure under “ the interlocutor complained of, and to hear parties on “ any question that may be raised under the summons.”\*

In the meanwhile the respondents had presented a petition to the Court, praying for a warrant on the factor acting under the sequestration to pay them out of the rents the current and future annuities while they were unredeemed. This was opposed by the appellant, chiefly on the ground that, pending a ranking and sale, and before a judicial rental had been made up, a warrant for an interim payment was not competent; and that the sasine taken on the bond was inept.

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\* 10 S. & D., p. 616.

The Court, on the 6th of July 1832, after the usual remit to the Lord Ordinary, and on his report, granted warrant for an interim payment.\*

The appellant presented separate petitions of appeal against the judgments in the ranking and sale and under the petition for the warrant.

To the competency of the former of these petitions of appeal the respondents objected; and the House, on the report of the Appeal Committee, directed the question of competency to be argued at the bar.

*Respondents.*—(Competency.)—The interlocutor of 2d June 1832 appealed against is not a judgment upon the merits of the cause, but a mere deliverance, remitting the case to the Lord Ordinary for further consideration. No leave to appeal was given by the Court; neither was there a difference of opinion among the Judges when the interlocutor was pronounced.† Had the Court intended to pronounce a final judgment in favour of the respondents, instead of remitting to the Lord Ordinary to sist procedure, and to hear parties further, they would have recalled the interlocutor, sustained the defences, and dismissed the action; but the judgment merely directs the Lord Ordinary to sist further procedure under the interlocutor, and “to hear parties on all questions that may be raised under the summons.” It was quite competent for the appellant to have enrolled the cause before the Lord Ordinary, in order that parties might be heard on the objection to the formality of the summons, and the competency of the action. Even if no objection to the form of the

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\* 10 S. & D., p. 773.

† 48 Geo. 3. cap. 151. sec. 15.

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summons had occurred, and the Court, without remitting to the Lord Ordinary, had thought proper, de plano, to sist the process of ranking until the other actions for trying the validity of the Gartmore entails were decided, no appeal would have been competent without the leave of the Court.

*Appellant.*—One of the grounds on which the appellant complains of the interlocutor is, that it was incompetent; that the only competent order which could be pronounced in terms of the acts of parliament relative to actions of ranking and sale was the order pronounced by Lord Medwyn. It must therefore be assumed at this stage of the argument, that the objection of the appellant is well founded. In so far as relates to the matter of competency, the interlocutor is final. The Judges have decided finally that they had power to sist the proceedings. They have assumed a power which they did not possess; and the appellant was entitled to the judgment of this House on the competency of the exercise of any such power.

THE HOUSE dismissed the petition of appeal in the ranking and sale as incompetent. The further discussion was therefore confined to the appeal against the interim warrant.

*Appellant.*—(Merits.)—1. It was incompetent for the Court of Session to sustain the respondents claim at the time they issued the warrant consistently with the various acts of parliament and acts of sederunt which are in force regarding actions of ranking and sale. It is the clear intention of those acts to tie up the

estate of the bankrupt, whenever an action of this nature shall be raised, until it shall be ascertained what is the real amount of the debts claimed, with their respective preferences, and also what is the real value of the bankrupt's estate; in particular, that no payment of the principal sum claimed by any of the creditors shall be made until the rights of parties are ascertained, after a regular investigation with all parties in the field. With this view it is required that a common agent shall be appointed, whose duty it is to investigate the respective titles of the parties, and till that is done no creditor can receive any payment. Even when this is done, the act of sederunt, 11th of July 1794, enacts that "no creditor, however preferable, shall, in time coming, be entitled to draw, by interim warrants, any sum out of the common funds, without sufficient cause shown to the Court, and in no case shall draw full payment, and no interim warrant shall be granted before decret of certification is extracted, except for interest or annuities." But the Court have given decree in favour of the respondents, not only for the interest, but also for a part of the principal of their debt, before any decree of certification has been even allowed to be pronounced. The claim made by the respondents is not for that sort of interest or annuity contemplated in the act of sederunt,—it is a claim truly for part of the principal under the name of redeemable annuity, which is so calculated as to include payment annually partly of the principal and partly of interest of the debt.

It has been said by the respondents that they are not properly in petitorio, but in possessorio, and that it was unnecessary for them to apply to the Court to entitle them to draw the rents. This plea is founded on the

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allegation that they are in possession, in virtue of a decree of maills and duties. But that action is inept. The only party called was Mr. Graham, who was divested of the lands by a deed granted by him in favour of trustees for his creditors, in virtue of which deed these trustees were actually infeft and in possession of the lands, and yet these parties were never cited, and never appeared in the action.

2. The sasine, upon the validity of which the respondents claim depends, is null and void.

1 Nicol Graham granted a procuratory of resignation, under which a crown charter was issued in favour of Robert Graham and his successors, heirs of entail, under the limitations and conditions of the entail. The procuratory being merely in favour of heirs of entail, the superior had no power to insert in the charter any grant or privilege in favour of third parties. Accordingly, the Barons of Exchequer did not do so, and the clause in the crown charter authorizing infeftment to be taken at the mansion house for the whole lands is granted in favour of the heirs of entail exclusively. Now sasine was taken in favour of the original creditor, Henry Wood, not on the discontinuous estates, but at the manor-place of Gartmore alone, for which there was no warrant. The clause of dispensation being expressly limited to heirs of entails, and not being extended to singular successors or assignees, and still less to heritable creditors, it is a personal, not a transmissible, right.\*

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\* Stair, b. ii. tit. 3. sec. 44 and 45, Brodie's ed. p. 253; Erskine, b. ii. tit. 3. sec. 45; Scott v. Bruce Stewart, 21st Jan. 1777; Mor. voce "Sasine," App. No. 2; Bell on Completing Titles, 236, 240, 244, 252, 277, ed. 1815; Craig, lib. 3, Dieg. 7. sec. 13, 14, &c.; Drummond, 27th Feb. 1761, Mor. 6934, and 17th May 1793, Mor. 6936; Bell on Titles, p. 255, 271.

*Respondents.*—1. The first objection of the appellant is founded on the circumstance of his having brought an action of ranking and sale, and a warrant for payment having been granted before a common agent was appointed or a judicial rental made up. It would be strange if there had been any established rule of Court unknown to the judges by which no payment could under any circumstances be made till this was done; but the practice is directly the contrary of that alleged by the appellant. Indeed, if there were any such rule, it would often lead to consequences singularly severe and unjust. In a great majority of cases, annuities form the means of subsistence to the parties holding the securities. The respondents are first heritable creditors. It would be great injustice if the rents could be retained by a factor, or payment suspended by any process instituted by postponed creditors, the preliminary points of which may not be settled for a series of years.

No doubt, in many actions of ranking and sale (where the competency or relevancy is not disputed), it has been the practice not to apply for warrants till a proof of the rent and burdens is adduced, as such evidence is usually brought in an early stage of the cause, and (when there are no preliminary pleas to be settled) can be completed in a few days.

Here, however, it may be four or five years before the competency of the ranking and sale is finally determined; and it would be exceedingly hard and unjust to hold that the first and preferable creditor is to be kept out of his annuities during all that time. The Court did not grant the warrant de plano, but remitted to the judicial factor to report, and on his report they were satisfied that the warrant should be granted. Besides, the respondents were in possession of the rents

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under their action of maills and duties, and clearly preferable to the appellant. But, independent of this, they were entitled to payment from the judicial factor. Accordingly Mr. Bell says, "A creditor who is unquestionably preferable is not compelled to abide the final settlement of the ranking and division; but he cannot have his payment, either of principal or interest, without a warrant from the Court," &c. This is supported by all the older authorities and modern decisions.\*

2. The second objection is, that the infestment should have been taken on every separate and unconnected part of the estate; that the dispensation was only given to Robert Graham and the succeeding heirs of entail; and that as the heritable creditor was not an heir of entail he could not act upon the dispensation; and therefore that the sasine so taken is null. But this objection is not supported by any authority. Lord Stair says, that "if the lands united by the King be disposed wholly together by the vassal to others subalternly infest, the union stands valid; July 12, 1626, Stuart contra Howe; repeated Jan. 25, 1627, Stuart contra Coldingham Feuars; which, for the same reason, ought to be extended to subaltern infestments of an annual rent out of a barony or united tenement, which was found to extend to a mill, and to lands lying discontigue, though not taken in the place designed in the union." — *Spotis. Executors, Lady Ednem v. Tenants of Ednem*.†

Union in Scottish charters is explained thus by

\* Bell's Com. vol. ii. p. 289; Stair, b. 4. tit. 35. sec. 26, 28; Inglis's Trustee against Goldie, 14th Jan. 1825, S. S. & D., 435 (303, new ed.); Crombie against Napier, 9th Dec. 1824, S. S. & D., p. 380 (new ed. 269.)

† 2 Stair, S. 44; Bankton, vol. i. p. 549; Erskine, b. ii. tit. 3. sec. 46; Stewart against the Earl of Home, Mor. p. 10367; Skene against Ogilvie, 19th Jan. 1768, Mor. p. 8792.

Erskine:—"Where lands lie discontinuous, though all  
 " the tenements should be of the same kind, and  
 " holden by the same tenure, and derived from the  
 " same author, under the same superior, there must be  
 " a separate seisin for each, unless the King shall have  
 " united them into one tenantry by a charter of union,  
 " *i. e.* by a charter in which the sovereign dispenses  
 " with the necessity of taking a separate seisin upon  
 " every discontinuous tenement, and declares that one  
 " seisin shall be sufficient for the whole." Again he  
 says, "it is implied in the very notion of union that  
 " the lands united by the charter receive the same  
 " quality as if they had been conterminous or naturally  
 " united; and if a clause of union be not allowed to  
 " have this effect it can have none."\*

The plea of the appellant, that the dispensation is  
 personal to the heirs of entail, and not transmissible to  
 creditors or other third parties, is quite untenable.  
 Accordingly, Lord Stair says, "Assignations are  
 " effectual, not only of such rights as are granted  
 " to heirs and assignees, but generally to all rights,  
 " though not mentioning assignees, which by their  
 " nature are transmissible."† And in like manner  
 Mr. Erskine says, "The general rule is, that whoever is  
 " in the right of any subject, though it should not bear  
 " to assignees, may at pleasure convey it to another,  
 " except where he is barred either by the nature of the  
 " subject or by immemorial custom."‡

LORD WYNFORD.—My Lords, I do not know how  
 this House can feel itself competent to say, upon a mere

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\* Erskine, b. ii. tit. 3. sec. 45; Bell's Principles, sec. 875.

† 3 Stair, 1. 16.

‡ Erskine, b. iii. tit. 5. sec. 2.

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matter of practice, that the Court below has done wrong. They are the best judges of the ordinary mode of proceeding in a case of this sort. I know not that there is any question of practice in Westminster Hall which can be brought under the consideration of this House. The Courts in which these points of practice arise are the final judges, and it is convenient that that should be the case. This case seems to have been considered by the Court of Session as so perfectly clear that the judges do not give any reasons for the judgment pronounced, whereas, upon other occasions, when any serious question comes before them, they do give the reasons; but in this case the judges said (as in a thousand instances I have said in one of the Courts below), it is a point of practice, and is so and so, without attempting to give any reason. I recollect one of our learned judges, when at the bar, on being pressed to give a reason upon a matter of this sort, said, "It is so, but I cannot tell why, any more than I can why great A is made in the shape it is—it has been made so a great many years, and we had better continue to make it in that shape;" and in truth no better reason can be given for many points of practice. Now what are the objections in this case? The first is, that the Court did not appoint a common agent to examine the titles of the different claimants; but they have taken another course, which seems to me warranted by practice, and to be equally effectual for the purposes of justice. They have referred it to the officer of the Court to inquire into those points which the common agent would have inquired into; and they have referred it to the judicial factor to inquire into the value of the property and the extent of the estate to be disposed of. Now, the only question is, whether they

were bound to have the inquiry made by this agent, or whether it was not perfectly sufficient to do what they have done,—to refer the case to the officer of Court? I should think the course adopted by the Court was the more convenient one, and the one more likely to attain justice in this particular case. Then it is said, they have issued a warrant for a part of this money before any judgment has been given; and we have been referred in support of this objection to the act of *sederunt* of the 11th of July 1794, which I will read to your Lordships: “Whereas it has been usual for the preferable creditors to apply for interim warrants upon the factor for payment of sums due to them, and sometimes by such interim warrants preferable creditors get the whole or most part of the sums due to them before the order of ranking is finally settled, which practice has by experience been found to be attended with inconvenience; no creditor, however preferable, shall in time coming be entitled to draw by interim warrant any sum out of the common funds without sufficient cause shown to the Court.” Now, are we not to suppose that sufficient cause was shown to the Court when they granted that interim warrant, and that the Court had satisfied itself of the propriety of so doing? Then it goes on,—“and in no case shall draw full payment, and no interim warrant shall be granted before decret of certification is extracted, except for interest or annuities;” so that, generally speaking, the decret of certification must be extracted before the interim warrant is granted. But the question is, whether this case does not fall within the exception, “except for interest or annuities.” This is a case of interest,—a case of annuity. It was argued

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that this warrant gives the whole value of the annuity; —it does no such thing,—it does not give the value of the annuity, but only the half-year's annuity; and the value of the annuity is left untouched by any thing done by the Court below or by your Lordships. But it is said, this is not one of the annuities to which the act of sederunt applies; that it only applies to annuities given for aliment. If that had been so the judges who drew the act would have said so; but the reason upon which it proceeds applies to one annuity as much as another, whether that annuity has been granted upon the consideration of natural love and affection to a wife or child, or whether it has been granted for a valuable consideration. The principle is this, that the whole sum is not to be paid,—that remains untouched;—all that is to be paid is the actual annuity becoming due at the end of the current year. The Court by this act of sederunt have thought it right to except those cases out of the general rule which they have prescribed; and I cannot point out to my own mind any possible distinction between one description of annuity and the other. Then the next point made is, that the action of maills and duties did not give the party a complete right, because the trustees were in possession. But that is sufficiently explained. The trustees were in possession for the party who had the judgment of maills and duties; and instead of turning them out, he says, “It is more convenient for you to remain in, but remember you remain in, not under the original appointment as trustees, but as my agents, and upon condition of paying me first,” which is as complete a possession under the action of maills and duties as it is possible for the parties to have.

The only other point is, that the sasine was not taken upon different parts of the estate; and it is said, that the act of consolidation, or whatever Scotch term it is called by, only applies to the heirs of entail entitled to the estate, and it is not to be extended to parties who derive right from, and who claim under them, and, therefore, that the sasine taken at the manor place in virtue of the clause of dispensation in the bond of annuity granted by one of these heirs is inept, as it was not taken on the separate lands. We have not been referred to any authority to show that this indulgence given to the heirs is not to be extended to persons who claim under them, and I think that the opinions referred to from Lord Stair govern this case. He says, "Union is the conjunction or incorporation of lands or tenements lying discontiguous, or several kinds unto one tenement, that one sasine may suffice for them all," (so that this union is to have that very purpose which has been given in this case, that a great number of sasines, accompanied with unnecessary trouble, and attended with useless expense, may be rendered unnecessary), "in which there is sometimes expressed a special place where sasine should be taken; and when that is not, sasine upon any part is sufficient; for the whole lands lying contiguous are naturally united, and need no union, so that sasine taken upon any one of them extendeth to the whole; but where they lie discontiguous, other tenements being interjected, there must be sasine taken upon every discontiguous tenement," unless there is a license, as in this case. Then he goes on: "Union can be constituted originally by no other than the sovereign authority conceding the same, and, therefore, union being constitute by a subject not

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 24th March “ exception at the instance of the possessors, though  
 1834. “ pretending no right; and when there is a place for  
 FERRIER “ the sasine of the union, a sasine taken elsewhere reaches  
 (White’s “ none of the lands lying discontigue, but if the lands  
 Trustee) “ united by the King be disponed wholly together by  
 v “ the vassal to others subalternly infest, the union stands  
 MOUBRAY “ valid, which, for the same reason, ought to be extended  
 and others. “ to subaltern infestments of an annual rent out of a  
 (Wood’s “ barony or united tenement which was found to extend  
 Trustees). “ to a mill, and to lands lying discontigue, though not  
 “ taken in the place designed in the union.” I can  
 only say, my Lords, I have a desire upon a subject of  
 this sort to adhere to that authority, which I think lays  
 down the principle, from which we may collect the  
 usual extent of this indulgence, of dispensing with the  
 necessity of sasines upon different parts; and I can see  
 no reason why one sasine for the mansion should not  
 answer for the whole estate. The judges below thought  
 that was sufficient, and your Lordships will not be dis-  
 posed to disturb that decision. I therefore move your  
 Lordships that the appeal may be dismissed, and the  
 costs paid, after taxation.

The House of Lords ordered and adjudged, That the  
 said petition and appeal be and is hereby dismissed this  
 House, and that the interlocutor therein complained of be  
 and the same is hereby affirmed: And it is further ordered,  
 That the appellant do pay or cause to be paid to the said  
 respondents the sum of 175*l.* for their costs in respect of  
 the said appeal.

RICHARDSON & CONNELL—SPOTTISWOODE & ROBERT-  
 SON—MEGGISON, PRINGLE, & MAINSBY, Solicitors,

[29th March 1834.]

WILLIAM AINSLIE TURNER, Trustee in the sequestrated Estate of CRAWFORD TAIT, Esq., Appellant. No. 9.

Mrs. BALLENDENE OF M'ILWHANNEL, Respondent.

*Property—Coal.*—A party who had a reserved right of coal in an estate carried an existing level under the bed of a stream into adjoining lands (to the coal of which he had also right) so as to drain the coal of those lands, and brought the water within the estate, and, by means of a steam engine, there raised it, and threw it on part of the surface of the estate: Found (affirming the judgment of the Court of Session), that he was not entitled to do so.

THE Dukes of Argyle were proprietors of various lands in the barony of Muckart in the shire of Perth, and also of the barony and lands of Dollar lying in the shire of Clackmannan, and immediately adjoining to those of Muckart. In 1748 John Duke of Argyle feued to John Ballendene (the predecessor of the respondent) the lands of Wester Pitgobar, subject to a clause of reservation in these terms: — “reserving  
 “ always to his Grace, and his heirs and successors,  
 “ the coals and coal heughs in the said lands, with the  
 “ liberty of digging coals and coal heughs on any part  
 “ of the said lands; but if his Grace and his foresaids

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 29th March   “ made, then and in that case they should be obliged  
 1834.       “ to pay to the said John Ballendene and his foresaids  
 TURNER      “ the damages which he or they should sustain thereby,  
 (Tait's Trustee)   “ as the same should be ascertained by two fit and  
 v.           “ faithful men to be mutually chosen by his Grace and  
 BALLENDENE.   “ his foresaids, and the said John Ballendene and his  
               “ foresaids.”

In September 1808, William Duke of Argyle, with consent of his brother, Lord John Campbell, and James Ferrier, Esq., sold to Crawford Tait, Esq., the lands and barony of Dollar, Campbell, and others, together with the coal and coal heughs within the lands and barony of Muckart, comprehending in particular the lands of Wester Pitgobar, “with full power and liberty  
 “ to the said Crawford Tait and his aforesaid of working  
 “ coal, and putting down sinks within any part of the  
 “ said lands, in so far as we or any of us have right  
 “ to do so, agreeable to the charters granted by me the  
 “ said Duke, or my ancestors or authors, to our feuars  
 “ and vassals within the said lands.”

The counties of Perth and Clackmannan are at this point divided by a stream of water called the Kellyburn, the barony of Muckart, (including the lands of Wester Pitgobar,) lying on the Perthshire bank, while the lands of Dollar, Campbell, and others are situated on the Clackmannanshire side. Part of the lands of Wester Pitgobar, called Kellybank, was disposed some years ago to a Mr. Brown. In the field of coal lying within these lands of Wester Pitgobar and Kellybank there were two levels; the one being called the “rough coal level,” which was at the greatest depth, and the other the “day level,” which was about seven fathoms nearer

to the surface. This "day level," after passing from Kellybank into the lands of Wester Pitgobar, terminated at the surface of the latter, about eleven hundred yards from the river Devon. A steam engine was erected at a coal pit on Kellybank, by means of which the water was pumped up from the "rough coal level" and discharged into the "day level," through which it flowed to the surface of the lands of Wester Pitgobar, and thence descended into the Devon.

About 1812 Mr. Tait acquired a lease of the coal of Middleton, forming part of the barony of Muckart, and lying adjacent to the lands of Wester Pitgobar. The lands of Middleton stood on a more elevated position than those of Wester Pitgobar, and consequently the water flowed naturally towards the latter. Mr. Tait having begun to drive a level through the coal of Middleton, so as to communicate with the "day level" of Wester Pitgobar, a bill of suspension and interdict was presented by the trustees of the late Mr. Ballendene, but it was refused by Lord Meadowbank, and the communication between the two levels was carried into execution.

In 1826 Mr. Tait acquired a lease of the coal in certain lands called Mackies lands, belonging to one John Mathie, and also a lease of the coal of other adjoining lands belonging to persons of the name of Paton. Permission was also obtained by Mr. Tait from the proprietor of Kellybank to make use of the engine situated on these lands for working and draining his coal. All these lands had formerly belonged to the Dukes of Argyle, and the titles contained clauses of reservation similar to the one above quoted. Mr. Tait then proceeded to form a communicating level from the coal in the lands of Mathie and Paton with the level in

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the lands of Kellybank. To accomplish this a level was carried under the bed of the Kellyburn, and thence to the engine pit, on the lands of Kellybank, so as to connect with the "rough-coal level." By means of the engine the water, not only of the coal field in Kellybank, but in the other lands, was drawn up and discharged into the "day level," after flowing through which it descended along the lands of Wester Pitgobar and found its way into the Devon.

The estates of Mr. Tait having been sequestrated under the bankrupt act, Mr. Turner was elected trustee, and proceeded to work the coals in the manner above mentioned. The respondent, as proprietrix of Wester Pitgobar, thereupon presented a petition to the sheriff of Perthshire against Turner, (to which she also called as parties the proprietors of the other lands,) in which she prayed the sheriff to "interdict, prohibit, and discharge the said William Ainslie Turner as trustee, &c., in working the coal in the said lands and estates of Dollar and Campbell," and the lands of Mathie and Paton, "from pumping up the water arising from the said coal workings respectively by the engines erected on the lands of Kellybank, or by any other opus manufactum, to the height of the higher level in the same lands, or at least from sending down or discharging the said water, or any part or portion thereof, when so raised or pumped up, into or through the level under ground in the petitioners lands, and from which, according to the present illegal and unwarrantable proceedings, the said water is made to issue and discharge itself upon the surface of the petitioners lands;" and also "from doing any other thing, act, or deed by which the water arising

“ from the coal workings aforesaid may be transmitted  
 “ or caused to flow, by a course altogether unnatural,  
 “ over or upon any part or portion of the petitioners  
 “ lands in all time coming.”

In defence, the appellant maintained, 1st, That the matter was *res judicata*, by the refusal of the bill of suspension and interdict in 1812; and, 2d, That as the Duke of Argyle was originally proprietor both of the lands of Wester Pitgobar and the adjoining estate of Dollar, it was evidently his intention, and it was the true meaning of the clause of reservation in the feu contract, that he should have right to work the coal in any part of the lands which then belonged to him, by means of the levels carried into and through the lands of Wester Pitgobar; and this was made certain by the circumstance, that a similar reservation was inserted in all the titles granted to the other vassals.

The Sheriff appointed an engineer to inspect the operations complained of, and to report “ whether, by  
 “ these operations, an additional quantity of water is  
 “ thrown upon the surface of the pursuer’s said lands  
 “ to what arises from the working of the coal within  
 “ the same; and if so, the way and manner in which  
 “ that is accomplished, and the quarter from which the  
 “ additional quantity of water proceeds, and the time  
 “ when the operations were made.”

The report of the engineer established the facts already narrated; and the Sheriff found, “ that by  
 “ means of a steam engine erected on the lands of  
 “ Kellybank, an additional quantity of water to that  
 “ arising from the pursuer’s lands is thrown upon their  
 “ surface, and passes over the same a distance of one  
 “ thousand and sixty-five yards, and then falls into the

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“ river Devon, which steam engine pumps up the water  
 “ seven fathoms from the mine and levels of the rough  
 “ coal, and delivers it into the day level, along which it  
 “ passes to its mouth or outlet, where it is discharged  
 “ on the surface of the pursuer's lands; that the said  
 “ additional quantity of water is brought from the coal  
 “ workings in the lands of the defenders, John Mathie,  
 “ Jean and Anne Patton, and the coal under the feus  
 “ of Dollar, belonging to the defender Mr. Turner,  
 “ along with the water arising from Kellybank coal;  
 “ that under the reservation in the pursuer's title deeds,  
 “ specified in the interlocutor of 15th of October last,  
 “ the defender Mr. Turner was not entitled, by the  
 “ foresaid opus manufactum, to throw the said addi-  
 “ tional water on the pursuer's grounds; and no attempt  
 “ appears to have been made to do so previous to the  
 “ spring of 1826; therefore interdicted the defender  
 “ from bringing to the surface of the pursuer's grounds  
 “ any of the water arising from the workings of the  
 “ foresaid coal in time coming;” and decerned, with  
 expenses.

Turner having brought an advocacy, the Lord Ordinary found, “ in terms of the Sheriff's inter-  
 “ locutor, that, by means of a steam engine erected  
 “ on the lands of Kellybank, an additional quantity of  
 “ water to that arising from the pursuer's lands is  
 “ thrown upon their surface, and passes over the same  
 “ a distance of one thousand and sixty-five yards, and  
 “ then falls into the river Devon, which steam engine  
 “ pumps up the water seven fathoms from the mine and  
 “ levels of the rough coal, and delivers it into the day  
 “ level, along which it passes to its mouth or outlet,  
 “ where it is discharged on the surface of the pursuer's

“ lands; that the said additional quantity of water is  
 “ brought from the coal workings in the lands of John  
 “ Mathie, Jean and Anne Patton (the other defenders  
 “ in the inferior Court), and the coal under the feus of  
 “ Dollar, belonging to the advocator, along with the  
 “ water arising from Kellybank coal; and therefore  
 “ remitted the cause simpliciter to the Sheriff, and de-  
 “ cerned; found the advocator liable in expenses, both  
 “ in this and in the inferior Court,” &c.

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Turner having reclaimed to the First Division of the Court, their Lordships, on the 3d of March 1832, adhered.\*

Turner appealed.

*Appellant.*—The judgments appealed from proceed on a mistake in the construction of the clause of reservation. It was assumed that the reserved level was intended only for the purpose of working the coal in the small lot of ground called Wester Pitgobar, whereas the only rational object in making such a reservation was to enable the superior to use it for the whole of his other property, including the coal in all the portions of ground in question. It was on a similar construction that the bill of suspension was refused in 1812, and on which the parties afterwards acted. It was also on a similar construction that the Court gave judgment on a clause of reservation made by the Duke of Hamilton, who had granted feu rights of certain subjects belonging to his Grace.†

\* 10 S. & D., 415.

† Davidson v. Duke of Hamilton, 15th May 1822, 1 S. & D. 411. (new ed. 385.)

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*Respondent.*—The expression of the clause is quite clear and distinct. It is confined to the coals and pits in the particular lands conveyed. Those lands are the lands of Wester Pitgobar, and the reservation is definitely “of the coals and coal heughs in the said lands,” with the right and power of working them. Thus, neither the Duke of Argyle, nor any successor, could use the level for working any other coals than those reserved in the said lands, not even in other lands in the barony of Muckart, and still less in lands which form no part of that barony. The decision in 1812, which was merely by a Lord Ordinary in the bill chamber, cannot form *res judicata*, and was given in reference to circumstances different from those in question. The lands of Middleton being more elevated than those of Wester Pitgobar, the water naturally descended upon the latter, whereas here the lands are situated in a lower position, and it is only by means of an engine that the water is brought into the lands of the respondent.

LORD CHANCELLOR.—My Lords, this case arises upon the construction of a clause of reservation in a charter granted by the Duke of Argyle, in the year 1748; and the question which is here as to the interdict is the same, on which will turn ultimately the decision by the Court below, in any action of declarator which may be brought by the appellant, for having his right ascertained in respect of the subject matter in dispute. That question is, whether or not the reservation of the coal and coal-heughs, and the liberty of digging coal and coal-heughs in any part of the lands feued, is such as to give the party reserving it, or to those standing in his place, a right to dig in the feued lands, for the

purpose of winning, not only the coal reserved, but other coal, either the property or in the occupation of the lord, or of those standing in his place,—that coal being in fields contiguous to the fields feued out, and which therefore might conveniently be worked through the same pit or level? This question depends entirely upon the construction of the clause of reservation. In the course of the argument, I frequently threw out to the counsel the grounds upon which I think the Court below have come to a right conclusion in construing this clause, so that it is unnecessary to trouble your Lordships with any detailed exposition of my reasons for that opinion, as it would only be a repetition of what I have said before. In construing this instrument, as in every other instrument, we are to look to that which is the main and governing purpose of the parties on each side. The purpose of this clause plainly is, to reserve the coal under the surface of the property feued out by the conveyance. That this is not a servitude is perfectly clear, and I do not find that the respondents have relied upon it as a servitude; and certainly it does not appear that in the Court below that was any part of the reasons upon which the decision was pronounced. Reference is made to the opinion by Lord Craigie; but I see nothing to lead me to believe that the Court disposed of this question, upon the ground of the reservation being that of a servitude, and not of a right to the coal; and it appears to me that it would be doing great violence to this clause, if any such construction had been imposed upon it. Lord Craigie states that he has a doubt upon the matter. He says, “that under the clause of reservation, a question of damage might arise, in conse-

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“ quehce of the operations of Turner, if they were  
 “ injurious to the grounds.” This is quite consistent  
 with the argument maintained by the respondents.  
 His Lordship says, “ the interest which the superior  
 “ reserved in the coal was not of the nature of a  
 “ servitude, but of a right of property.” Now, what  
 follows from this which can at all help you in that  
 which alone you are now contending about, namely,  
 whether the right to take levels, and so forth, extends  
 to the use of the neighbouring coal fields, or whether  
 it is confined to the coal field in which is the coal  
 reserved. No step is gained towards the point of  
 finding whether or not the right to dig is reserved  
 beyond the uses of the very coal which is reserved.  
 His Lordship then adds, as if it were a conclusion  
 from it, “ and the reservation was made in reference to  
 “ the great body of coal, then belonging to him, in  
 “ several contiguous lands.” But that is a complete  
 begging of the question; for that is the very point  
 in dispute, whether it was in reference to the coal  
 particularly reserved, or to other coal belonging to the  
 same proprietor? But it will not do to say that it is a  
 property reserved, and not a servitude, and therefore  
 that the property reserved gives you a right to make  
 levels, and so forth, for the purpose of digging all other  
 coal as well as that coal, because the two propositions  
 have no connexion with one another. You may admit  
 the first, and you may deny the second, or you may  
 deny both together, or you may deny the first and  
 admit the second; the things are perfectly uncon-  
 nected. This doubt, therefore, of Lord Craigie’s does  
 not bear upon the question, or impeach the soundness  
 of the construction put upon this clause. Therefore as

to the construction of this clause, which is the main question, I have no doubt whatever. The only question is, whether upon other grounds the Court below was right:—The sheriff first of all in granting the interdict, and the Court in confirming the grant? Now, if I found reason to believe that the respondents had been guilty of any laches,—if they had stood by and allowed the other party to dig pits and place levels, and so to expend money upon an operation which they, by obtaining an interdict, were able to stop at any time, and to render ineffectual,—I should then have thought, that, (supposing the practice of the Courts of Scotland upon that subject to be the same as it is in this country), the judge ought not to have protected them, and ought not to have entertained the proceeding. But I do not find that that fact exists in such a manner as to render it at all applicable to this case. Then, the only question is upon the two cases that have been referred to. I throw aside altogether two other cases, which do not appear to me to bear in the smallest degree upon the case. But two cases were cited, which do bear upon the question; the one is that of Davidson v. Hamilton\*, to which I have already adverted in the course of the argument. When you look into that, you find that it was in its circumstances in a great degree special. It was not a declarator of right, but an interdict; and I think, looking at the circumstances, considering that it was all one conveyance, and that all the feus were granted out at the same time, (though it would have been better to have reserved the right of digging and driving levels,

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\* 1 S. & D., No. 468.

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as well for the service of the adjoining coal, as of the coal by which the right was reserved,) still, taking the whole together, I do not see any reason to doubt the correctness of the discretion which the Court exercised in refusing that interdict and sustaining that right. Then we come to the only case upon which I entertained any doubt, and which occurred in 1812, between the same parties, upon a somewhat different subject matter, in regard to a bill of suspension and interdict presented at that period, and which was followed by the decision of the late Lord Meadowbank. I am not prepared to say that the two judgments will not stand well together, even if the earlier decision were upon the same subject matter; but I think there is a somewhat material difference between the two cases, which makes it possible to distinguish the one from the other. I, however, mainly rest upon this, that there having been one result when the matter was not thoroughly investigated, and there being now a more full investigation, and the whole matter of the construction of this important clause being more fully gone into, and the subject of the whole litigation being more completely before the Court, I should consider that it was not necessarily inconsistent with what was done in 1812, that in 1832 the interdict should be granted. The construction of the clause appears to me to be so plain—it is so much a matter of law upon the facts—it seems to be so clear, that that construction which is supposed to have been given to it in 1812, when the interdict was refused, would, if such was given, have been a wrong construction,—that I think it perfectly possible that that former decision may stand together with the present. It was relied upon in the Court below as a *res judicata*,

and it is carried much further by the learned counsel for the appellant, for they say that they rely upon the proceedings upon that occasion, as showing an acquiescence by the opposite party in the right so adjudged in favour of the appellant. It is more judicious to regard it not as *res judicata*, but as a strong consideration or inducement to move the Court, in the exercise of its discretion, to withhold the interdict. Now, as that was between the same parties, and upon the same subject matter, I do not deny that in that point of view it deserved great consideration, and I have no doubt it met with that consideration in the Court below; but seeing, in the first place, that there is no absolute inconsistency between the two cases, and, next, that if there had been an identity of the two judgments, in regard to the circumstances of the case, yet, that, upon a full consideration of the clause, they might well stand together, I am disposed to propose to your Lordships to affirm the judgment of the Court below. I shall not propose that it should be affirmed with costs, on account of the first judgment which was pronounced between the same parties.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

ALEXANDER MUNDELL.—THOMAS DEANS, Solicitors.

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[5th April 1834.]

No. 10. ARTHUR JOHN ROBERTSON, Appellant.—*Lord Advocate*  
(*Jeffrey*).

Mrs. LETITIA ETTLES, Respondent.—*Dr. Lushington*.

*Stamp Act—Bill.*—Held (reversing the judgment of the Court of Session), that a bill written on a stamp of lower value than required by law is null as a ground of action ; and circumstances in which this was not obviated by other documents being libelled on.

1ST DIVISION. **T**HE respondent, Mrs. Ettles, raised a summons in  
Lord Corehouse. 1830 before the sheriff of Inverness-shire against the  
appellant, setting forth “ That where the said Mrs. Le-  
“ titia Ettles, pursuer, by her bill, dated the 27th day  
“ of February, in the year 1816, drawn by her upon and  
“ accepted by Masterton Robertson, Esq., of Inches,  
“ advocate, now deceased, ordered him, twelve months  
“ after date, to pay to her, or order, the sum of  
“ 145*l.* 19*s.* 4½*d.* sterling money, for value received, as  
“ the said bill bears ; and which bill will be produced  
“ at the first calling hereof, and is herein holden as  
“ repeated brevitatis causâ : That on the 10th day of  
“ February in the year 1817 the said Masterton Robert-  
“ son executed a trust deed for behoof of the said  
“ Letitia Ettles, pursuer, and his other creditors, in  
“ favour of David Welsh, Esq., writer to the signet

“ in Edinburgh, wherein the said bill and sum of  
 “ money therein contained, and a separate debt of 35*l.*  
 “ sterling due to the pursuer, are recognized and ranked  
 “ as just and true debts due by him; and upon the  
 “ precept of sasine contained in the said trust deed  
 “ the said David Welsh was duly infeft and seased, as  
 “ trustee for the use and behoof of the pursuer and  
 “ the said other creditors, whereby the pursuer became  
 “ a heritable creditor for her said debt; and accord-  
 “ ingly she acceded to the said trust, and signed the  
 “ deed of accession along with the other creditors on the  
 “ 11th day of February in the year 1817, and she was  
 “ entered and ranked accordingly, as the said trust  
 “ deed, infeftment thereon, and deed of accession  
 “ thereto in themselves more fully bear: That in or  
 “ about the year 1822 the said David Welsh, as trus-  
 “ tee foresaid, by the hands of the late John Mac-  
 “ tavish, solicitor in Inverness, factor on the estate of  
 “ Inches under the said David Welsh, made payment  
 “ to the pursuer of the foresaid separate debt of 35*l.*,  
 “ and interest due thereon, but could not, for want of  
 “ funds at the time, pay the foresaid bill, which with  
 “ the contents thereof was made a real burden, and  
 “ became heritably secured upon the lands and estate  
 “ of Inches in manner foresaid: That the said Master-  
 “ ton Robertson having died in the month of October  
 “ 1822 years, the said David Welsh, notwithstanding,  
 “ still continued the management of the estate as  
 “ trustee for the pursuer and the other creditors; but  
 “ in the year 1825 he renounced and gave up, or at  
 “ least made over, the foresaid trust in favour of  
 “ Arthur John Robertson, Esq., now of Inches, the  
 “ eldest son and heir of the said Masterton Robertson,

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No. 10.      “ his father, with the burden, however, of the pursuer’s  
 5th April    “ debt as contained in the said bill, trust deed, infest-  
 1834.        “ ment, and deed of accession; and thereupon the  
 ROBERTSON   “ said Arthur John Robertson made up titles, &c.,  
 v.            “ whereby, and by his other actings and behaviour, he  
 ETTLES.     “ represented and now represents his said father as  
 “ heir foresaid, and also as executor and universal  
 “ intromitter on all the passive titles known in law,  
 “ &c., and thereby subjected himself liable to the pur-  
 “ suer for payment of the said bill, and principal and  
 “ interest therein contained, and afterwards rendered  
 “ a heritable debt in manner foresaid; as the said  
 “ renunciation and reconveyance by the said David  
 “ Welsh, and the foresaid titles expedite by the said  
 “ Arthur John Robertson, in his character of heir and  
 “ executor foresaid, in themselves also more fully bear.”  
 She therefore concluded, that “ the said Arthur John  
 “ Robertson, defender, as heir and executor foresaid,  
 “ and as otherways representing the said Masterton  
 “ Robertson, his father, on one or other of the passive  
 “ titles known in law, and thereby subjecting himself  
 “ to the payment of all his father’s just and lawful  
 “ debts, and particularly the aforesaid debt due to the  
 “ pursuer in manner aforesaid, ought and should be  
 “ decerned and ordained, by decret of me or my  
 “ substitute, to make payment to the pursuer, the said  
 “ Mrs. Letitia Ettles, of the foresaid principal sum of  
 “ 145*l.* 19*s.* 4½*d.* sterling, and the legal interest thereof  
 “ since the same fell due and in time coming during  
 “ the notpayment contained in the foresaid bill, trust  
 “ deed, and infestment, and relative deed of accession,  
 “ and renunciation and reconveyance, all above-nar-  
 “ rated.”

In defence the appellant pleaded that the bill was prescribed, in answer to which the respondent maintained, on various grounds, that the plea was elided.

The record being closed, the sheriff pronounced this interlocutor:—"Sustains the plea of prescription, but " allows the pursuer to prove the debt contained in " the bill libelled on, and that the same is resting owing " by the writ or oath of the defender." Mrs. Ettles thereupon brought an advocacion; and the appellant, for the first time, pleaded that as the bill was written on a 4*s.* 6*d.* instead of a 5*s.* stamp it was null, and could not form the ground of an action.

The Lord Ordinary pronounced the following interlocutor:—"The Lord Ordinary having considered the " closed record, &c. advocates the cause; alters the " interlocutor of the sheriff; decerns against the re- " spondent in terms of the libel; finds him liable in " the expenses incurred in this and the inferior Court; " and remits the account," &c.

"*Note.*—In the inferior Court the only objection " stated against the claim of the advocator was, that the " bill by which the debt had been originally constituted " was extinguished by the sexennial prescription. After " the parties came to discuss the reasons of advocacion in " this Court, the respondent found out a new plea, viz. " that the bill was written on a 4*s.* 6*d.* instead of a 5*s.* " stamp. Either of these objections might have been " sufficient in point of form to cast the action, if it had " proceeded exclusively on the bill. But that is not " the case. The libel narrates a variety of documents " importing a recognition of the debt, and concludes, " not merely for payment of the bill, but of the debt as " vouched by those documents.

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“ On the merits, it is enough to say that the sum now  
 “ claimed, with the addition of another sum on open  
 “ account, and formerly paid, was given up by the  
 “ truster in the list of his debts; that it was expressly  
 “ stated to be due in the trust deed subscribed by him,  
 “ and also in the infestment taken upon it by the trustee;  
 “ that it was recognised during all the proceedings  
 “ under the trust by the trustee and his agents, as  
 “ appears from the minutes of the creditors, and letters  
 “ produced; that it makes part of the sum stated as  
 “ unpaid in the accountant’s report at the close of the  
 “ trust management; and that it is again mentioned  
 “ in the deed of reconveyance in favour of the respon-  
 “ dent. It is true that the trust deed contains the  
 “ usual clause of style, reserving right to the truster,  
 “ the trustee, and the creditors, to object to the debts  
 “ as therein enumerated. But that reservation can  
 “ import nothing more than that they shall be entitled  
 “ to object within a reasonable time, and while the  
 “ claimants have an opportunity of proving their debts.  
 “ In this case no objection was stated by the truster in  
 “ his lifetime, by the trustee or the creditors during  
 “ the trust management, or by the respondent, the heir  
 “ and representative of the truster, till this action was  
 “ raised, thirteen years after the date of the trust deed.  
 “ After so long a period, during which the advocator  
 “ was induced to believe that her debt, as ranked, was  
 “ admitted, and after the agent for the trustee had ex-  
 “ pressly written to her that it was sufficiently constituted,  
 “ the Lord Ordinary holds that the respondent is  
 “ barred, both by delay and by personal exception,  
 “ from sheltering himself under the clause in question.  
 “ This plea is particularly strong, as it applies to the

“ defence of the sexennial prescription, which did not  
 “ expire till five years after the date of the trust deed,  
 “ to which the advocator acceded, and which not only  
 “ recognized the debt, but stipulated for a supersedere  
 “ of diligence.

“ But it is no less applicable to the defence upon the  
 “ stamp laws. If that objection had been stated in the  
 “ truster’s lifetime, the advocator might have had an  
 “ opportunity of constituting the debt, if not by other  
 “ documents, at least by a reference to his oath—an  
 “ opportunity which she has lost in consequence of  
 “ thirteen years delay, and the belief which, from the  
 “ conduct of the parties, she was warranted to entertain.  
 “ It is said that the bill was not lodged with the trustee,  
 “ and this seems to be admitted; but he may have  
 “ inspected it in the hands of the advocator, or of  
 “ Mackenzie, or his partner, who acted for her, and  
 “ who were also agents for the trustee. At any rate, it  
 “ was incumbent on the trustee to have examined the  
 “ document before he suffered so many acts of recog-  
 “ nition to take place, and that during a period of so  
 “ many years. And if this defence would have met the  
 “ trustee acting for behoof of competing creditors, it  
 “ must be still stronger against the son and representa-  
 “ tive of the truster since the retrocession of the trust  
 “ estate.

“ The case of Crawford’s trustees (25th May 1827),  
 “ on which the respondent relies, in so far as it is  
 “ applicable, is a precedent against him. The bill  
 “ there was found prescribed against certain parties  
 “ whose names were upon it, although it had been  
 “ lodged under the sequestration of another obligant,  
 “ but at a meeting different from that which the statute

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“ requires, and not in the hands of the trustee or sheriff  
 “ clerk, as directed. But with regard to the bankrupt  
 “ himself, with whose trustee, under a private trust, it  
 “ had been lodged and recognised, no doubt was enter-  
 “ tained by the Court that the sexennial prescription  
 “ was barred.”

This interlocutor having been adhered to by the Inner House on the 15th of February 1833\*, Robertson appealed.

*Appellant.*—The summons expressly libels on the bill as the ground of the debt sought to be recovered, and as it is null under the stamp laws it could not be founded on, either as the ground of action, or as the voucher of a debt.

Even if it could be held that the summons does not libel exclusively upon the bill, still the bill, in disposing of the merits of the case, must be laid out of view, and consequently there is no legal evidence to prove the debt in favour of the respondent.†

*Respondent.*—In the circumstances of this case, the appellant is barred by personal exception, and by delay, from pleading the defence upon the stamp laws, against the bill.

The bill is written and dated at “ Inches,” the residence of the acceptor, Masterton Robertson. From the appearance of the writing, as well as by the presumption of the law, this bill is the individual production, as it was

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\* 11 S. & D., 397.

† Other pleas were maintained, but as the judgment was pronounced in respect of the objection to the stamp they are not reported.

the legal obligation, of that person. It was by him delivered to the respondent as the security and voucher of her debt, of which of course she had no warning to preserve any other evidence.

No objection was taken upon this ground on the part of Masterton Robertson, between the date of the acceptance and the accession of the respondent to the trust; and accordingly no new or more perfect obligation was required by her upon that occasion.

Neither was any exception stated to the bill, during the life of Masterton Robertson, and the respondent has therefore lost the opportunity, otherwise available, of referring the subsistence of the debt to the oath of the debtor himself.

Even after the death of Masterton Robertson a total silence was observed as to the defect of stamping, as well as to all other objections, not only during the whole proceedings of the trust, but after the retrocession of the estate to the appellant, and down to the debate before the Lord Ordinary in the Outer House. All other means, therefore, originally competent to the respondent for establishing her debt, either by parole testimony, or by subsidiary writings, are now unattainable or extinguished; and as, during all that period, the respondent was called upon for no other evidence of her debt than that furnished by the bill, but was held and treated upon all occasions as an undoubted creditor in virtue of that document alone, the appellant cannot now object to it as a ground of claim.

But even in the absence of the bill there is enough in the facts alleged, and the other documents produced, to support the conclusion at the instance of the respondent for payment of the debt.

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LORD CHANCELLOR.—I need not trouble your Lordships with any observations in this case. It is quite clear that the interlocutors cannot stand; they must be reversed, but simply on the ground of the stamp act.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed.

JOHN MACQUEEN—DAVID CALDWELL and SON,  
Solicitors.

[7th April 1834.]

ANDREW MILLER, Appellant.—*Lord Advocate (Jeffrey)* No. 11.  
—*Dr. Lushington.*

Earl of GLASGOW and others, Heritors of the Parish of  
—Neilston, Respondents.—*Attorney General (Campbell)*  
—*Murray.*

*Church.*—Where the population of a parish has greatly increased, so that there is not sufficient accommodation in the parish church for such increase, and the church is not ruinous, nor in such a state as to require rebuilding,—Held (affirming the judgment of the Court of Session), that the heritors are not bound to enlarge the old or build a new church to accommodate such increased population.

Question, Whether the assessments should be on the real or the valued rent ?

THE church of the parish of Neilston was built in 1762, and then contained less than 500 sittings. It was enlarged in the year 1798, and made to accommodate about 800 sitters. Between 1762 and 1828 the population of the parish had increased from about 1,300 to 6,800, and the rental from about 500*l.* to about 1,600*l.* The parish contains one or two villages, but no burgh. The increase of the population was caused chiefly by the establishment of public works. The parties in the Court below were at issue as to whether the church was

2D DIVISION.

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in a good state of repair, and a great deal of detail was entered upon in relation to this matter. The case was however argued in the House of Lords on the footing that it was in a proper state of repair, but was inadequate to give accommodation to the legal proportion of the population, and therefore it is not necessary to take any notice of the statements in regard to the state of the building. The subject having been brought before the presbytery of Paisley, they came to the following resolution on the 30th of August 1827 :—“ The church of Neilston “ appeared to the presbytery at last sederunt as greatly “ deficient in the extent of accommodation, and not in “ a good state of repair either in the wood or walls. “ The presbytery did and hereby do adhere to and “ adopt said opinion, and do find and discern accord- “ ingly : Find, that the church of Neilston is, according “ to the census verified upon oath by Mr. Anderson, “ totally insufficient and inadequate for the accommoda- “ tion of the parishioners of Neilston capable of attend- “ ing public worship : Find, that the parish of Neilston “ contains at present 6,808 persons, of which number “ 4,789 are above twelve years of age : Find, that two “ thirds of 4,789 make 3,192 examinable persons who “ have, by law and practice of the supreme Court, a “ right to be accommodated with seats in the church of “ Neilston : Find, that only 830 persons are at present “ accommodated in said church, which, deducted from “ 3,192, leaves 2,362 persons to be accommodated : “ Find, that additional accommodation ought to be “ provided for these 2,362, agreeable to law ; and discern “ accordingly.”

Estimates, with plans and specifications, were ordered to be procured, and having been given in to the pres-

bytery, they preferred certain estimates “ for enlarging  
 “ and repairing the church of Neilston, &c., amounting  
 “ to the sum of 4,313*l.* 18*s.* 4*d.* sterling; and ordained  
 “ said plans and specifications to be carried into effect  
 “ for the accommodation of the parishioners of Neilston,  
 “ so soon as the whole sums are collected from the heri-  
 “ tors for that purpose; wherefore the presbytery did and  
 “ hereby do assess the whole heritors of the parish of  
 “ Neilston in the sum of 4,556*l.* 0*s.* 4*d.* sterling, for  
 “ enlarging and repairing said church, including in the  
 “ said sum 66*l.* 18*s.* sterling for incidental expenses,  
 “ &c.; and the presbytery did and hereby do appoint  
 “ the said sums to be paid by the heritors according  
 “ to their valued rent in said parish.”

The appellant, Mr. Miller, was appointed collector, and laid a state of allocation before the presbytery, who sustained the same, and decerned accordingly. He then raised letters of horning and gave charges of payment to the respondents as heritors, who presented a bill of suspension on the ground mainly that they were under no liability to enlarge the church for the accommodation of the increased population. The bill having been passed, the letters came before Lord Fullerton, Ordinary, who, on the 5th of July 1830, pronounced this interlocutor:—“ The Lord Ordinary having heard parties procurators, and considered  
 “ the closed record and productions, in respect that it  
 “ was not proved by the reports of the tradesmen employed, and has not been found by the presbytery of  
 “ Paisley, on considering those reports, that the church  
 “ of Neilston was in such a state of dilapidation as to  
 “ require to be rebuilt, or to be repaired to an extent  
 “ substantially equivalent to rebuilding,—finds that it

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“ was incompetent for the presbytery to order an enlargement of the said church, on account of its inadequacy to accommodate the increased population of the parish; and therefore suspends the letters simpliciter, and decerns; finds no expenses due.” His Lordship at the same time issued the subjoined note.\*

Miller presented a reclaiming note on the merits, and the respondents a similar note in regard to expenses. The Court, on the 1st February 1831, refused Miller’s note; but altered the interlocutor as to expenses, and found Miller liable in them, reserving to him relief against his employers and constituents.† In pronouncing this judgment, the following opinions (which were laid before the House of Lords) were delivered:—

*Lord Justice Clerk.*—I was not one of those who were ultimately called upon to give a judgment in the case of Methven, but when that case was first before us I con-

\* “ *Note.*—It was determined in the case of Methven, 14th May 1828, that heritors cannot be called upon to enlarge a parish church when in good repair, on the ground of its inadequacy to accommodate the increased population of the parish; and, according to the opinion of the consulted Judges in that case in regard to the former practice of the Court, even the permanency of the increased population ‘ does not appear to have been considered by the Court as warranting a demand to enlarge the church, unless the church, at the time of the demand, was so ruinous as either to render it necessary to rebuild it, or to give it such extensive repairs, that an addition became a matter of little moment in adding to the expense.’ Now, in the present case, the reports of tradesmen, obtained by the presbytery, do certainly not appear to the Lord Ordinary to support a demand for the enlargement of the church upon that ground; and accordingly all that is found upon that point by the presbytery, in their resolution of 30th August 1827, is, ‘ that the church is not in a good state of repair, either in the wood or the walls,’ —a finding falling very far short indeed of what would be requisite, according to the fair construction of the rule laid down in the case of Methven, to subject the heritors to the obligation to enlarge it. In short, it appears to the Lord Ordinary, on looking into the whole proceedings, that the resolution of the presbytery cannot be maintained on the state of the church, but truly rested on the state of the population.”

† 9 S. & D, 370.

curred in the propriety of sending it for the opinions of the other Division; and when those opinions came back to us, I may state, that although, from circumstances, I was not called on to vote, I concurred entirely in the principles there laid down. The first question which there occurred, and was submitted for the opinion of the consulted Judges, was “Whether heritors can be called upon to enlarge a parish church which is in good repair, on the ground that it is greatly inadequate to the accommodation of the increased population of the parish?” To this an answer was returned:—“We are of opinion that the heritors cannot be so called upon.” A second question was no doubt put, relative to the special circumstances of the case of Methven, to which the consulted Judges answered, that there was less reason there than in the general case; but whether the ultimate judgment of the Court went upon general or on special grounds, it is quite clear that the law, as applicable to the present case, is ruled by the principles there laid down. The case, however, was decided upon the general ground, and the point had also been previously fixed by the decision of the Court in the case of Stewarton. Under these decisions, the law is now reduced to the clear principle on which the Lord Ordinary has here rested his judgment, and comes in all such cases to turn upon the question,—Whether the church is ruinous, or in such a state of disrepair as to make it a matter of little moment, in estimating the expense, whether it is to be repaired or rebuilt?—or, as the Lord Ordinary has put it—if the necessary repairs should be substantially equivalent to rebuilding? Apply this principle to the present case:—There is here no doubt whatever of the

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matter of fact as to the state of repair of the church ; and I am ashamed to see such reports founded on, as those on which the decision of the reverend presbytery rests. We have the reports of two respectable tradesmen (M<sup>c</sup>Queen and Miller), who were appointed by the presbytery themselves in the first instance, and whose opinions are conclusive as to the state of the church ; and the subsequent reports by inferior tradesmen, appointed ex parte, are deserving of no weight whatever.

*Lord Meadowbank* concurred in the view given of the general question of law. There is no doubt whatever left by the decisions of the Court upon the general principle applicable to questions of this kind, and there is as little doubt of the application of this general principle to the present case. Every body knows that Government provides funds to meet those cases where, from accidental circumstances, the means of religious instruction are denied. A remedy may also be provided by private subscription ; but it would be the hardest thing in the world to lay the burden of building a new church upon heritors in such a case.

*Lord Cringletie* concurred in the opinions which had been delivered.

*Lord Glenlee* also concurred upon the general question. In addition to this, it is settled law, that in cases such as this, where the population is not properly landward, but increases in consequence of manufactures, the valued rent is not the correct rule of assessment. But here, even if the proceedings of the presbytery had been regular, the facts of the case do not justify their finding. As to the question of expenses, it is clear that the presbytery cannot be liable, and it is equally clear that

Mr. Miller, as collector, cannot be liable; but Mr. Miller must be employed by somebody or other who is to protect him against loss.

*Lord Justice Clerk.*—In regard to the question of expenses I have no doubt whatever of the competency of finding expenses, and it is no defence to state that the collector is a public officer, as it is quite clear that there must be somebody or other behind him to cover his retreat. It is of no consequence whether this real party be a body of subscribers, or even the reverend presbytery themselves. If a case for expenses is made out, I have no doubt whatever of the competency of awarding them; but perhaps, upon the whole, it may be sufficient to mark our opinion of this case, to give expenses only since the date of the Lord Ordinary's interlocutor. The principles of law being then clearly laid down by his Lordship, it is impossible for the parties to pretend ignorance, and they should have acquiesced in his judgment.

*Lord Meadowbank.*—I concur entirely with your Lordship as to the competency of awarding expenses; but I do not think it would be doing justice to the heritors to award them partially. Your Lordships will observe, that the proceedings have been very expensive; and, considering the whole circumstances, and the nature of the reports and proceedings before the presbytery, I cannot view the conduct of the parties who have pressed forward this matter, otherwise than as being most unnecessary, indecorous, and oppressive.

*Lords Cringletie and Glenlee* concurred in the opinion of Lord Meadowbank.

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*Appellant.*—The general principle in regard to the building of a parish church is, that it ought to be of dimensions sufficient to give accommodation to the parishioners capable of attending divine service. It is on this principle that all parish churches are built; and as it is the essential characteristic of an established church, that there is a provision made by law for the supply of religious instruction to the whole community, it is necessary, as the population of the country increases, that there should be a corresponding increase in the means of this supply. It therefore follows that where a permanent increase of population takes place in a parish, a corresponding enlargement must be made of the church. Unless this be enforced, a large proportion of the population may, in consequence of the mere

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\* On the above decision being pronounced a petition was presented by Miller and other inhabitants of the parish of Neilston to the General Assembly, praying for aid with a view to appeal to the House of Lords. The petition was remitted to the procurator for the church, who made a report, in which he stated, “ I certainly do not think that the present is “ the best case in which such a question could be tried ; but there is a “ danger of no other occurring within a reasonable time ; and every year “ that the decision in that of Methven is allowed to stand unchallenged, “ the difficulty of obtaining an alteration in the Court of the last resort “ will be increased ; and therefore, on condition that the petitioners will “ shape their appeal so as to lead to the decision of the abstract question, “ without regard to the specialties which they have hitherto founded on “ as being involved in their particular case (but which I do not think “ would, in any circumstances, have been entitled to much weight), I “ would humbly recommend that the assembly should give its sanction “ to their proposal of carrying the case by appeal to the House of Lords.” It was also mentioned in the appeal case, that “ it may not be altogether “ irregular to inform your Lordships that the present appeal is, in fact, “ brought under the express sanction of the venerable General Assembly, “ with the special view of trying, at your Lordships bar, the validity of “ the judgment in the case of Methven.”

architectural state of the fabric of the parish church, be left destitute of religious instruction, which is at variance with the idea of an established church. It is a mistake to suppose that this right, and the obligation on the part of those who are bound to furnish church accommodation, depend on a special statute. Both the right and the obligation are founded on the common law, and the statute was merely declaratory and corroborative of the previous law. Before the Reformation the canon law regulated all ecclesiastical matters. Its authority in doctrine was overthrown by the Reformation; but in so far as related to the civil rights and obligations connected with the fabric of the church it is still an existing authority. Through the whole of that law there runs one general principle, which is the essential principle of a church establishment; viz., that the whole community must be provided with accommodation for attending religious ordinances within the walls of the church. In accordance with this principle it was settled that an increase of population necessarily inferred an extension of accommodation. On the same principle it was established, that where the people of a district became too numerous for the care of the pastor, additional instructors were to be appointed; and that where the increase of numbers was scattered over an extensive country, so as to make it impossible or inconvenient for them to come to the original place of worship, new parishes were to be constituted, and new churches erected. So, on the same principle, not only was the parish church to be upheld in a constant state of repair, and to be rebuilt when ruinous, but to have an addition or enlargement made to its fabric

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whenever a permanent increase of the number of the parishioners rendered it expedient.\*

The burden of accomplishing these objects, and more particularly of repairing and enlarging the church, was, by custom, divided in certain proportions between the clergy and the parishioners or the possessors of land within the parish; the practice being to lay the burden of the chancel upon the clergy, and of the nave or body of the church on the parishioners.† Numerous authorities recognize the canon law as of authority in these respects in Scotland.‡

The statutory enactments are not only not at variance, but are confirmatory of these principles and rules. They were intended to enforce the law already in operation, and to fix more accurately the allocation of the burden than otherwise in many cases could be done. || Their object plainly was, not to introduce for the first time a legal provision on the subject of church accommodation, or to abolish the previous existing law, but to put "ordour thereto," and contemplated the enforce-

\* Decretum Gratiani, P. 2. xvi. 1, 53; Decrees of Council of Trent, sess. 21; cap. 4; Decret. Greg. lib. 3. p. 48. de Ecclesiis Edificandis. Paulus Lancelottus, Institutiones Juris Canonici, lib. 2. t. 18; Corvinus, Jus Canonicum, lib. 2. t. 20; Decretum, P. 2. x. 1. 10; Peckius de Ecclesiis Reparandis, cap. 3; Carpzovius, Definitiones Ecclesiasticæ, lib. 2. t. 2. Def. 3. 50.

† Decret. P. 2. xii. 2, 28, 30; Van Espen, Jus Ecclesiasticum, P. 2. sec. 2. t. 1. cap. 6; Peckius de Ecclesiis Reparandis, cap. 14. 20. 22; Van Espen, vol. i. p. 637; Boehmer, Jus Ecclesiasticum, lib. iii. 48. 71; Gibson, Codex Juris Ecclesiastici Anglicani, vol. i. p. 223.

‡ Statutes 1493, cap. 51; 1540, cap. 80; 1551, cap. 22; 1 Bankton, 42; 1 Stair, 1. 14; Canons of Perth, tom. i. p. 607, 618; Hailes' Annals, vol. iii. p. 163; Chambers' Caledonia, vol. i. p. 685; Chart of Aberdeen, folio, 66; M'Farlane, M.S. in Advoc. Bib. vol. i. p. 33, 304, vol. ii. p. 199, 556, 558, 932; Connell's Sup. App., No. 2.; Balfour, p. 35.

|| Statute 1563, cap. 76; Act of Privy Council, 13th Sept. 1563; Statute 1572, cap. 74.

ment of an existing obligation. This is confirmed by the decisions pronounced on the interpretation of, and carrying into effect, these statutes.\* In the progress of the Reformation, and on the establishment of the presbyterian form of church government, the jurisdiction in regard to these matters was transferred from the bishop to the presbytery; and as the clergy became stipendiaries the whole burden of upholding and enlarging the church was laid on the parishioners, which was interpreted to mean the heritors of the parish. This was also a necessary result of the appropriation of the tithes to laymen, and of the power conferred on heritors of acquiring right to their tithes.† The practice of the country, as well as the decisions of the Supreme Court, until the case of Methven, also support the position maintained by the appellant.‡ It is true that in the case of Methven the Judges arrived at an opposite conclusion; but that decision was pronounced almost simultaneously with the present one, and cannot therefore be quoted as a precedent so as to prevent this House from giving judgment according to the established law.

It only remains to observe that if any objection be

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\* *Shaw v. Countess of Wigton*, 25th June 1623, Mor. 7913; *Kirk of Selkirk v. Stewart*, 30th Nov. 1628, Mor. 7913; *Williamson v. Parishioners of Kirkaldy*, 25th March 1685, Mor. 7914.

† *Connell's Sup.*, p. 12; *Forbes on Tithes*, p. 209.

‡ *Connell on Parishes*, p. 8; *Session Papers in the case of the Minister of Dunning v. the Heritors*, 10th June 1807, Mor. No. 4., App. Kirk; *Acts of Assembly*, 1638, 1647, 1700, 1706; *Stewart of Pardovan's Collection*, b. 1. 18. 10; *Feuars of Crieff v. Heritors*, 20th Nov. 1781, Mor. 7924; *Minister of Tingwell v. the Heritors*, 22d June 1787, Mor. 7928; *Connell's Sup.*, p. 30; *Harlaw v. Heritors of Peterhead*, 19th Jan. 1802, *Connell's Sup.*, p. 24; *Cunninghame v. Deans*, 12th Dec. 1811; *Maxwell v. Gordon*, 19th June 1816, 4 Dow, 279; *Menzies v. Heritors of Lerwick*, 17th Jan. 1820; *Connell's Sup.*, p. 44, 53, 125.



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taken to the assessment being laid on according to the valued rent, the appellant is willing that the assessment should be made according to the real rent.

*Respondents.*—'The act of the Privy Council 1563, ratified by act of parliament 1572, c. 54, as modified and explained by usage, affords the only rule to determine the liability of heritors for the expense of building or repairing churches. And although presbyteries exercise a jurisdiction in enforcing the provisions of that act so modified, it is limited to those cases to which the act clearly applies. They have therefore no authority to tax heritors for the expense of providing additional church accommodation for the increased population of a parish in which there is already a sufficient church. Had there been any pretence for the plea maintained by the appellants, that presbyteries have a power to impose a tax for providing sufficient church accommodation in parishes where there is a good church, but where the population has increased, there must have occurred so many cases of this description as to warrant an argument that presbyteries had acquired by usage a more extensive jurisdiction than what originally belonged to them. But there is no instance of any such practice; and in the only two cases in which presbyteries are known to have assumed such a power, their judgments were reversed by the Court of Session.\* In the case of Methven, a large majority of the heritors concurred in the view taken by the presbytery, that the

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\* Cuninghame v. Deans, 12th Dec. 1811; Smythe of Methven v. Lord Lynedoch and others, 14th May 1828, 6 S. & D., 791.

permanent increased population of the parish afforded a legal ground for ordaining an addition to be built to the parish church. But the Court, although the point was not entirely new, (as it had formerly been decided, in the case of Stewarton,) considered it proper to take the opinion of the whole Court; and the Judges unanimously affirmed the judgment of the Lord Ordinary, —“ that the increased population of a parish is not a legal ground for subjecting heritors in the expense of adding to a church that is substantially in good repair.” The respondents are therefore entitled to rely on these decisions, to the effect, at all events, of showing that there is no usage on which they can be made liable for the expense of building a new church in respect of an increase in the population.

But if there be no such usage, the appellant is bound to show that the claim is founded either upon statute, or legal principle. The Act of the Privy Council 1563 is quite inapplicable. It provides, “ that all parish kirks within the realm, which are decayed and fallen down, be upbiggen; and where they are ruinous and faulty, may be sufficiently mended in windows, thack, and other necessaries, to be maintained and upholden upon the expenses of the parishioners and parson in manner following; that is to say, the two part thereof to be made by the parishioners, and the third part by the parson.” It is on the provisions of this act, as explained and modified by usage, that the obligation of proprietors of lands in country parishes to provide church accommodation is founded; but there is no pretext for maintaining that they can be extended, so as to impose upon heritors

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the obligation to enlarge the church or build a new one where there is an increase of the population, notwithstanding there is a good and sufficient church. The effect of holding that a new church must be built would necessarily lead to the result, that in all parishes where the population is increasing the heritors must either at first build a church much larger than is actually required for present use, or make new additions to meet every fresh influx of population. Thus, for instance, had a new church been built in the parish of Neilston in 1801, when the population was only 3,796, the heritors, according to the appellant's plea, must have erected an addition to or a new enlarged church in the year 1821, when the population was 6,549. But this enlarged church would not have accommodated the population in the year 1828, for it then amounted to 6,808, and still less would it have been sufficient in 1831, when it had increased to 8,046. If the mere fact of the increase of population impose upon the heritors a legal obligation to provide church accommodation, without reference to the state of the church, it is obvious that the obligation would be unceasing, because the erection of a single public work might make an addition of 700 or 800 people, for whom, if the argument is well founded, church accommodation must be immediately provided by the heritors.

But even if the presbytery were entitled to impose such an assessment, their proceedings were irregular, in so far as they ordered the assessment to be levied not in respect of the real but of the valued rent; and the proper parties were not called for their interest.

LORD CHANCELLOR.—My Lords, this case has been argued with consummate ability, and in a manner extremely convenient for the ultimate decision of it. I think it cannot be doubted that this was a case extremely fit to be brought here for ultimate decision; that it is for the interests of the church, and for the interests of the law itself, that a decision should now finally be pronounced upon what appears to have been of late years a matter of some controversy among those whose interests this question particularly affects,—the one party in their secular, and the other in their spiritual concerns. My Lords, this impression which I have respecting the propriety of this case coming here, would only go to the question of costs; for it remains to be seen whether that question of costs will arise; because a much greater and more important question is, whether or not your Lordships should concur in the opinion of the Court below. Now, whatever the impression of my mind might be upon the merits, I must, in consideration of the importance of the subject, and from the wish to examine more minutely the authorities, pray your Lordships that this case may stand over. Previously to entering into this examination, I may observe, that the way in which I am disposed to view this question is this: Here is a right claimed on behalf of the King's subjects using the Established Church, and belonging to the Established Church—a right claimed also on behalf of the Established Church itself—to throw this burden, exclusively of all others, upon the heritors—the burden, not merely of repairing the church when it is in a state of dilapidation—not merely of rebuilding the church when it has come down, or when the disrepair is so large as to make the rebuilding as little costly as repair-

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ing—not of enlarging the church, should it be in circumstances to make such rebuilding necessary;—but, the church being in a state of repair, and sufficient to admit those whom it was sufficient to accommodate when first built, the burden of adding to the church, in respect to the increased demand for room for the increased population of the parish. That is what the Court of Session, differing from the presbytery, have refused to burden the heritors with; and this statement is of itself sufficient to show that the proof is upon those who would cast that burden on the heritors in the same way, as if a question were to arise respecting any other load which one class of the community were seeking to shift from themselves upon another class. If it is the law that the heritors shall be burdened with that load, to the relief of their fellow-subjects,—as they are unquestionably burdened at present, to the relief of their fellow-subjects, with the building of the church when it is in dilapidation, and the enlargement of the church, to meet the increasing demands of the population for church room, when they are called upon to rebuild it;—if the same load is to be cast upon them exclusively, when there is no such disrepair, but only an inadequacy of accommodation, and if in this case, as in the former, the law relieves the other part of the community,—then, no doubt, the heritors will have no right to complain. All I mean to lay down as my clear and unhesitating opinion is, that the proof of that is upon the appellant seeking to impose that burden on the heritors. He has attempted to show the existence of this burden in various ways:—by reference to principle—by reference, more or less distinctly, to the authority of the canon law—and by reference to one authority, (which, by going a great deal

too far, and by asserting a state of right and a state of law which it is not pretended exists in any way at the present day, either in Scotland or in England, seems to me to be an authority to which little or no weight can be ascribed in the present controversy)—and by reference to the authority of adjudged cases. Of these, we have two, which go with me for little; because it appears, that, in the one, there was an acquiescence on the part of the heritors, one of them being expressly stated to be an application by the heritors themselves to the presbytery; and the other (the case of Hornsey), which was an application for a faculty, without which the church could not be built, and that faculty was granted; but there are dicta in that case which go a great deal beyond it, which I do not very well see the foundation of, and which I cannot reconcile with what at present is clearly understood to be the law of this country. That law is not that churches shall be built in the way that has been contended at the bar, and for which there is no authority even in the Hornsey case; but, as in the case of Hornsey, the majority of the parishioners applied to the Court, and obtained a faculty: so, in the Scotch case, some of the heritors seem to have applied to the presbytery, and obtained their intervention, for the purpose of making it a formal and regular proceeding, binding upon the whole. Those two cases, therefore, appear to me to go very little way towards obtaining the materials of an accurate decision upon this question. But then we come to the other cases, that of Lerwick and of Dunning. The Dunning case seems to me to come much nearer the present than any other that has been cited, or that I have found in the text-books. It is a decision of the

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Lord Ordinary, Bannatyne, and not of the Court, though the decision of the Court, so far as it goes, is not in contradiction to Lord Bannatyne's decision, but rather in support of it. Lord Bannatyne's judgment appears to me difficult, if not impossible, to be reconciled with the Methven case. That latter case appears to have been very well considered, and we have to regret that we have not the reasons of the consulted Judges, and are but scantily furnished with the reasons of the other Judges upon which their opinions were grounded. The Dunning case is stated in the report as having been argued upon at the bar, but no mention is made of it by any of the learned Judges; and this is the more to be regretted, because one would wish to see how far they had attended to it in forming their opinion upon the case then before them. With respect to the authorities upon the other side, it is by no means correct to say that they rest upon the Methven decision alone. The Stewarton case seems to be a case, I will not say deciding directly this very point, but dealing with it in its decision. We have, in that case, the dicta of judges of high authority, and especially one of them, who was distinguished both as a great lawyer in general matters of municipal jurisprudence, and more especially a lawyer of the very highest authority, both personal, official, and professional, upon questions of this description—I mean Lord Robertson. I beg to be understood as most entirely subscribing my assent in favour of the weight to be given to that authority, not only from his connexion with the great leading men of the church, and his constant habits of intercourse with them, and of conference with them upon all such questions, for a great many years, but from his long course of experi-

ence in those matters, and from having filled the office of Procurator of the Church of Scotland twenty or thirty years, till he was elevated to the bench. His authority is as high as that of any Judge can be upon such questions. Now, it is quite clear that he held it to be a mere novelty to set up any such claim; and he illustrates the opinion he had formed unfavourable to the proposition, independently of the novelty of it (though the novelty is decisive, because you cannot invent a new burden, and throw it upon one class of the community, without authority), by entering into reasons. It is true that he was there dealing with a proposition somewhat more startling than the one which is now contended for, namely, that when a parish increases in number, the old church, though in sufficient repair, must be taken down and a new one built. The present proposition is not so startling. The Dunning case appears also to have been of a less startling description, namely, that either a new church must be built sufficient to accommodate the increased population, or that an addition must be made to the old church. Nevertheless, Lord Robertson's opinion goes strongly against the doctrine now contended for on the part of the appellant. There is also the authority of Sir John Connell, though not given very expressly in terms, yet, on looking over the whole of the passages, we may collect from them an opinion distinctly coincident with the opinion of Lord Robertson, and we see that he ascribes but very little weight to the Dunning case, regarding it throughout as one in which the opinion of the Court was only given upon that point to which its attention was directed—the question of jurisdiction. What I have now stated I have purposely thrown out in order

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to dispense with the necessity of detaining your Lordships at any considerable length, when I shall come afterwards to propose to make a final decision of the case. If I shall remain of the opinion that I now entertain, and should see nothing in those two cases to impeach the general argument which is derived from the authorities of the Stewarton and Methven cases, and also, if I should see nothing to prove that the appellant has satisfied the exigency under which I hold him to be, of showing affirmatively his right to throw the burden upon the heritors, — then, by having made these observations now, I shall have saved your Lordships the trouble of entering at any great length into a statement of the case.

LORD DENMAN. — My Lords, I have communicated with my noble and learned friend throughout the argument upon this important case, and I agree generally with every word that he has uttered; but I take the liberty to observe, that even supposing the Dunning and Lerwick cases should be found to lay down a law directly opposite to that laid down in the Stewarton and Methven cases, still it appears to me that those cases (unless they should be supported by other authorities) would not justify this House in getting rid of the existing state of things. It appears to be quite clear, that even supposing such a law to be found to be distinctly recognised and laid down in those two cases, yet that law has never been laid down before. There is a perfect absence of all authority upon that subject; and that law could only be inferred from the general obligation to provide accommodation for the increasing population. And when, on the other hand, it is considered how extremely difficult it must be to determine the precise period, and lay down the exact line at which it

would become proper to call into exercise any discretion, for the purpose of imposing the heavy burden which an enlargement of the church would impose, it appears to me, that that consideration would probably be found to furnish a very sufficient reason why the law should have stopped short with imposing the obligation to a renewal of the former church, and not carrying the duty of further enlarging, except in the case where the church shall have become utterly ruinous, so as to require complete rebuilding. I have thought it right to throw out these few observations, because it appears to me, that even in the case supposed by my noble and learned friend, it would be hardly possible to question the decision that has been come to by the Court below.

LORD CHANCELLOR.—My Lords, I quite agree in what my noble and learned friend has just stated, that it would by no means be decisive, if I found the Dunning case and the Lerwick case as I have stated. The question would still be open upon the authorities.                   Adjourned.

LORD CHANCELLOR.—My Lords, it is very seldom that a case of greater importance ever comes before your Lordships; and if it would be at all times a question of great moment, it is peculiarly interesting at the present moment, when, from accidental circumstances, every question relating to the rights of the church, and of the heritors, and of the congregations in Scotland, appears to excite a more than ordinary share of attention. My Lords, I formerly stated the view I held of this case, and which was in entire accordance with the unanimous judgment of the Lords of the Court of Session, both in the Methven case and this case itself. The Methven case, however, was not of such old occurrence, and had

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not been for so long a period acquiesced in, as to claim the rank of an authority in the law, binding upon the Court below, and upon your Lordships; and we may take it as if the present case brought the Methven case as well as itself here for final decision. It is thus highly expedient that a final and deliberate attention should be bestowed upon this point of the Scotch Ecclesiastical Law;—and that attention, I flatter myself, has now been given to it. On a former occasion, I stated so fully the grounds upon which I agreed with their Lordships in the Court below, and the general principles which influenced my opinion, that I think it is unnecessary that I should do more now than advert to the matter upon which alone I desired time for further consideration: that was the two cases of Dunning and Lerwick, which had been pressed upon our consideration, and appeared, at first sight, not to be in strict accordance with the Methven case and the present case. The interlocutor of the Lord Ordinary in the case of Dunning I could not certainly reconcile with the principle of the Methven case, and the decision now under review; but, in that case, the Court appears to have argued chiefly, and decided entirely, the question of jurisdiction. Nevertheless, some things appear to have been assumed by their Lordships, which I did feel a difficulty in reconciling with the Methven case and the present case; and the same observation is applicable to the Lerwick case. We are therefore to consider that we have at the utmost only obiter dicta. We have no train of recognition of the principles to which those obiter dicta refer, by way of decision, nor even have we any train of obiter dicta; and what is more important, we have in the case of Stewarton, (which appears to have undergone a much

more deliberate degree of discussion,) a doctrine laid down by many of the learned judges, entirely in accordance with that of the Methven and the present case. Upon these grounds, I entirely come to the conclusion which was expressed by the learned Chief Justice, that even although, upon further consideration, it should be found less easy than it might have been expected, to reconcile the dicta in those two cases with the dicta on the opposite hand, that circumstance would be no ground to justify your Lordships in laying down the law for which the appellant has contended. I therefore, upon the whole, remain of the opinion which I originally expressed, that their Lordships have come to a sound and accurate conclusion upon this matter, and that the law cannot be said to be, that however great the increase of the population in a parish may be, provided the existing church is in sufficient repair;—nay, if it is not in such disrepair that it would be easier and better, or as easy and as well, to rebuild it,—in no case, except that, is it a matter of right on the part of the church or of the parish that there shall be an enlargement of the church, at the expense of the heritors, by either building a new church, or making a new addition to the old structure. I am perfectly aware of the objection, in point of principle, to which this position is subject. It was said (and I agree that it is difficult to evade such an observation,) that this is resting the important right of the people of Scotland to sufficient accommodation for religious worship in their churches, not upon the demand for that accommodation,—not upon the insufficiency of the accommodation now existing,—not upon the importance of that right to them, and their great anxiety to enjoy that right;—but resting it upon

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something of an accidental nature, which has no intimate, or substantial, or essential connexion with the matter itself,— which does not affect the demand for the accommodation,— which does not touch the supply of accommodation,— which does not touch the importance of the accommodation,—but which merely goes upon the accident of what state of repair the church may happen to be in at any given time, insomuch, that although the parish may have outgrown the church in population beyond all comparison, so that a church capable of holding, as in this case, eight hundred persons, may now be called upon to accommodate three thousand, nay, I might say, ten thousand; yet you never shall have for that population sufficient room allotted in church, where they may have the benefit of divine service, till it happens that the old church is either tumbling down or has actually come down. I feel the force of the statement, and I admit that this principle of the law of Scotland is liable to strong remark. At the same time, the opposite doctrine is liable to remarks of a nature as strong; because, where are you to draw the line? The population is constantly increasing. It does not even increase regularly. There may be a sudden and rapid increase by great commercial speculation in one seaport,—by opening a new channel for trade in a manufacturing town,—by a sudden cessation of hostilities, and the restoration of peace,— nay, even by the calamity of war, which may be accidentally useful to many. Instances are to be found in the neighbourhood of some of our great commercial and manufacturing towns in England, where the population has more than doubled in the course of eight or ten years, and there are instances of villages which have become large manu-

facturing towns; and then the church, which is in perfectly good repair, and was quite sufficient to accommodate the people formerly, becomes wholly inadequate to meet that demand. Are you then (according to the doctrine maintained by the appellant) to be allowed to resort to the presbytery, not to pull down an old church, and build a new one in its place, (for that is not contended for,) but to add a new church to the old? — and which, be it observed, implies a partial pulling down of the old, for of course it is not meant that the new church is to be without-side the old; consequently it implies the taking down the wall of the outside, which may be an operation of some risk, and may be attended with so much risk, that it would almost always raise the question, whether, if the church must be extended to double its size, it would not be better to take down the old church and build a new one. Then, as the population may have extended during ten or twelve years of peace, so during ten or twelve years of war it may shrink back to its former state, and the new building, which has been erected upon the spur of the occasion, remains comparatively useless. Again, even when the increase and demand for seat-room is more gradual than in the case I have figured, if it goes on regularly, as it has gone on recently, not doubling once in three or four hundred years as it used to do, but doubling once in twenty, or thirty, or forty years, then there must be an addition to the church, or a new church built, at intervals, almost every ten, twelve, or fifteen years. That I can see no warrant for whatever. It appears to be an arbitrary doctrine, assumed for the occasion, and to suit the purposes of the argument, and in which no reasonable qualification can be introduced (which goes very

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much against its existence as a doctrine of the law) to reconcile it with good sense, and with general convenience. Upon the whole, therefore, I am of opinion that the pressure of the difficulty is not all on one side, and does not lean and bear only against the doctrine upon which the learned Judges in the Court below have proceeded in this, and in the Methven case. The other side is liable to objections of at least as great, and I should say, of greater weight; and what is the result of the whole comparison of these two opposite lines of objection? From that comparison there results the remark, that the proper quarter to which to apply is the Legislature, which, if the law is defective on either hand, can well deal with the defect, for the purpose of supplying it, and which is not tied down to adopt the one principle or the other principle,—but which may, (though courts of law cannot,) without being put to any such election, adopt so much of the one as shall be consistent with general expediency, and so much of the other as shall make the rule taken not liable to those great objections. In the meantime your Lordships have only, in your judicial capacity, to administer the law as it is, and which, as it is, appears to me has been well decided upon by their Lordships in the Court below.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON—RICHARDSON and  
CONNELL, Solicitors.

[7th April 1834.]

ALEXANDER SCOT, W.S., Appellant.—*Lord Advocate* No.12.  
(*Jeffrey*)—*Knight*.

JAMES STEWART and Curators, Respondents.—  
*Dr. Lushington*.

*Minor—Cautioner*.—A gift of tutory dative was made in favour of three persons, without the specification of any quorum, or provision in favour of survivors; and the tutors appointed one of their number to be their factor, for whose intromissions a party became cautioner; and thereafter one of the tutors died: Held (reversing the judgment of the Court of Session), that the office of tutory terminated by the death of the tutor, that consequently the factory came to an end, and that the cautioner thenceforth was free from his obligation.

JAMES STEWART of Brugh died intestate in March 1811, leaving the respondent, an only child, in infancy, and without tutors or curators. On the 2d of June 1814 a gift of tutory was obtained from Exchequer in favour of Mrs. Stewart, the respondent's mother, Thomas Strong, merchant in Leith, and Alexander Stevenson, writer in Edinburgh. The gift was in these terms:—“ Nos fecimus, constituimus, et ordinamus  
“ dilectos nostros Magistram Marionam Stewart, Thomam Strong, et Alexandrum Stevenson, tutores  
“ dativos dicti Jacobi Stewart, ac administratores om-

1ST DIVISION.

Lds. Eldin,  
Newton,  
Fullerton,  
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“ nium et singularum terrarum suarum, hæreditatum,  
 “ possessionum, bonorumque omnium, mobilium et im-  
 “ mobilium, usque ad ejus legitimam ætatem pervenerit,  
 “ proviso tamen quod dicta Magistra Mariona Stewart,  
 “ Thomas Strong, et Alexander Stevenson, faciant et  
 “ perimpleant dicto Jacobo Stewart omnia et singula  
 “ quæ tutor dativus de jure, seu regni nostri consuetu-  
 “ dine, facere et perimplere tenetur. Et cum ad ipsius  
 “ legitimam ætatem pervenerit, sibi et propinquieribus  
 “ suis amicis, de dictis terris, firmis, redditibus, et bonis  
 “ fidelem computum et ratiocinium reddant.”

A bond of caution was granted at the same time by the tutors and by Baikie, in these terms:—“ We,  
 “ Mrs. Marion Stewart, otherwise Strong, relict of the de-  
 “ ceased James Stewart, last of Brugh, Thomas Strong,  
 “ merchant in Leith, and Alexander Stevenson, writer  
 “ in Edinburgh, as principals, and with and for us,  
 “ James Baikie, Esq., of Tankerness, as cautioner in  
 “ manner and to the effect after mentioned, considering  
 “ that his Majesty, with the advice and consent of the  
 “ Right Honourable the Barons of his Court of Exche-  
 “ quer in Scotland, hath by gift, &c.: Wit ye us,  
 “ therefore, to be bound and obliged, as we the said  
 “ Mrs. Marion Stewart, otherwise Strong, Thomas  
 “ Strong, and Alexander Stevenson, as principals, and  
 “ I, the said James Baikie, as cautioner, bind and  
 “ oblige ourselves, conjunctly and severally, and our  
 “ heirs, executors, and successors, to make just compt,  
 “ reckoning, and payment to the said pupil, when he  
 “ shall arrive at the age prescribed by law, of all intro-  
 “ missions, omissions, commissions, and acts of manage-  
 “ ment had by us, the said tutors, under and by virtue  
 “ of the said gift as accords of the law; and that we,

“ the said tutors, shall give up inventories of the said  
 “ pupil, his whole means and effects, both heritable and  
 “ moveable, conform to and in terms of the act of par-  
 “ liament made thereanent, and that under the penalty  
 “ of 200*l.* sterling, over and above performance. And  
 “ we, the said tutors, bind and oblige us and our fore-  
 “ saids, jointly and severally, to free and relieve the  
 “ said James Baikie, and his foresaids, of his cautionary  
 “ for us in the premises, and of all damages and ex-  
 “ penses he may sustain there through in any manner  
 “ of way whatsoever.”

The management of the estate was intrusted to Stevenson, who intromitted till 1819 without having any written deed of factory. On the 12th of April of that year a factory was granted to him in these terms :  
 “ We, Mrs. Marion Strong, otherwise Stewart, and  
 “ Thomas Strong, merchant in Leith, two of the tutors  
 “ dative of James Stewart, now of Brugh, only son and  
 “ heir of entail of the deceased James Stewart, Esq.,  
 “ last of Brugh, conform to gift of tutory in favour of  
 “ us and Alexander Stevenson, writer in Edinburgh,  
 “ dated the 2d day of June 1814 years, considering  
 “ that the said Alexander Stevenson has hitherto acted  
 “ as our commissioner, factor, and cashier in the ma-  
 “ nagement of the said pupil’s affairs, and that it is  
 “ necessary for us to confirm his appointment by a  
 “ regular commission with the usual powers, and  
 “ having full confidence in the integrity and ability of  
 “ the said Alexander Stevenson for that purpose ;  
 “ therefore we do, by these presents, nominate, con-  
 “ stitute, and appoint the said Alexander Stevenson to  
 “ be our commissioner, factor, cashier, and agent for  
 “ the purposes after mentioned, giving, granting, and

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“ committing to him full power, warrant, and commis-  
 “ sion for us and in our names to manage, transact,  
 “ and conduct all the affairs and concerns of the said  
 “ James Stewart, our pupil, as fully, freely, and com-  
 “ pletely in all respects as any other commissioner,  
 “ factor, cashier, or agent named with the most ample  
 “ powers could do in the like cases; and particularly,  
 “ without prejudice to this general commission, with  
 “ full power to our said commissioner to superintend  
 “ the management of the whole affairs and concerns of  
 “ the estates in Orkney and Shetland, belonging to the  
 “ said James Stewart, and of any other lands or herit-  
 “ ages which he may acquire or succeed to in time  
 “ coming; as also, with power to sell and dispose of  
 “ the whole kelp,” &c.; “ as also, for us and in our  
 “ name, as tutors foresaid, to demand, uplift, receive,  
 “ and, if necessary, pursue for all debts and sums of  
 “ money (exclusive of principal sums lent out on bond)  
 “ due or to become due to the said James Stewart, now  
 “ of Brugh, or to us as his tutors, by any person or  
 “ persons, receipts, discharges, and acquittances there-  
 “ for, or conveyances thereof to grant, which shall be  
 “ equally effectual as if subscribed by ourselves; as  
 “ also with power to disburse and lay out such sum or  
 “ sums of money as may be found necessary for the  
 “ aliment, education, or expenses of the said pupil, or  
 “ in the management of his estate and affairs; as also  
 “ with power to settle and clear accounts with  
 “ Mr. George Turnbull, present factor on the estate of  
 “ Brugh, or with any other factor or factors to be em-  
 “ ployed by us in Orkney in the management of the  
 “ lands and estate belonging to the said pupil, or in  
 “ any part of the affairs of the said James Stewart con-

“ nected therewith, and to discharge the said factor or  
 “ factors of their intromissions and management, upon  
 “ receiving payment of the balances that may be found  
 “ due by them; as also with power to our said com-  
 “ missioner to pursue in our names, as tutors foresaid,  
 “ all such actions as may be judged necessary in the  
 “ management and execution of the said pupil’s affairs,  
 “ and to defend us and him in all actions that may be  
 “ brought against us as tutors foresaid, or against the  
 “ said pupil, and in general to do every thing in exe-  
 “ cution of the powers hereby committed to him that  
 “ we could do ourselves if personally present; ratifying  
 “ hereby and confirming all and whatsoever acts and  
 “ deeds our said commissioner shall lawfully do or  
 “ cause to be done in the premises: but providing  
 “ always, as it is hereby specially provided and declared,  
 “ that the said Alexander Stevenson shall, by accept-  
 “ ance hereof, be bound and obliged to hold just compt,  
 “ reckoning, and payment to us or our quorum, for his  
 “ whole intromissions by virtue hereof, after deduction  
 “ always of his necessary disbursements, charges, and  
 “ expenses in the execution hereof, with a reasonable  
 “ gratification for his own trouble therein; declaring  
 “ the said Alexander Stevenson’s acceptance hereof  
 “ shall not hurt or prejudice his right as one of the  
 “ tutors of the said James Stewart, and that this  
 “ commission shall subsist until recalled in proper  
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On the same day a bond of caution was granted by  
 Stevenson, and Alexander Scot, W.S., his partner in  
 business, which, after narrating that Mrs. Stewart and  
 Mr. Strong, “tutors dative of James Stewart,” &c. had  
 appointed Stevenson to be their commissioner, factor,

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&c. proceeded thus :—“ Therefore I, the said Alexander  
“ Stevenson, as principal, and Alexander Scot, writer  
“ to the signet, as cautioner and surety with and for  
“ me, do hereby bind and oblige ourselves, conjunctly  
“ and severally, and our heirs, executors, and successors  
“ whomsoever, that I, the said Alexander Stevenson,  
“ shall hold just compt and reckoning with the said  
“ tutors, or any person appointed by them, not only for  
“ my whole actings, management, and intromissions  
“ whatsoever already had by me with the estate, funds,  
“ and effects of the said James Stewart as one of and  
“ as acting for the other tutors dative since the date of  
“ the said gift of tutory dative, but also for my whole  
“ actings, management, and intromissions whatsoever  
“ to be had by me in virtue of the before-mentioned  
“ commission and factory, or as their factor, cashier, or  
“ agent in any manner or way, and that I shall submit  
“ to the said tutors, for their examination and satisfac-  
“ tion, my accounts yearly, or so often as I shall be re-  
“ quired by them so to do; and that I, the said Alex-  
“ ander Stevenson, shall make payment to the said  
“ tutors of all sums of money which I shall uplift and  
“ receive in virtue of the said factory and commission,  
“ or the balance that may remain due thereon at the  
“ time, and that under the penalty of 100*l*. sterling,  
“ over and above payment and performance; and I,  
“ the said Alexander Stevenson, bind and oblige myself  
“ and my foresaids to free and relieve, and harmless  
“ keep, the said Alexander Scot and his foresaids from  
“ his cautionary obligation above written, and of all  
“ costs, skaith, damage, and expenses which he may  
“ any ways sustain or be put to by his becoming caution  
“ for me in manner foresaid.”

Strong died in August 1820, and Stevenson continued to intromit as formerly. Baikie, the cautioner for the tutors, raised an action in 1823, before the Court of Session, against Mrs. Stewart and Stevenson, the representatives of Strong, and against the pupil and his tutors and curators generally, concluding for exoneration from the bond of caution. Stevenson and Mrs. Stewart lodged defences. Decree was pronounced, the extract of which was of the following tenor:—"After sundry steps of procedure had taken place in said action before the Lord Cringletie, Ordinary thereto, his Lordship, upon the 3d day of June 1823, found that the respondent's bond of caution ceased, and was at an end at the death of Mr. Thomas Strong in August 1820; and ordained the defenders to give in a state of their accounts up to Mr. Strong's death, and that against the then next calling." The extract farther bore, that after a remit to an accountant, who made a report in January 1826, finding that a balance was due to Stevenson at the death of Strong, the Lord Ordinary, and by him the Court, "exonerated and discharged, and hereby exoner and discharge, the pursuer, James Baikie of Tankerness, of the cautionary obligation undertaken by him for the defender." The balance due to Stevenson, as in August 1820, was said to exceed 300*l*.

Stevenson continued to act as formerly, and it was alleged that between August 1820 and February 1825 he had intromitted to an extent which left him indebted to the estate in upwards of 2,000*l*.

The popularity of the appellant having terminated on the 23d of that month, he made choice of curators, and

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with their concurrence he brought an action of reduction in the Court of Session against Mr. Baikie and others, concluding to have the decree of the 3d of June 1823 reduced, on the ground that it was contrary to law, “in so far as it finds that the said gift of tutory fell “on August 1820, by the death of Thomas Strong, one “of the tutors; and also in so far as it finds that the “obligations come under when the said bonds ceased, “and were at an end by reason of Mr. Strong’s death. “The gift and bond both remained in full force, notwithstanding that event,—the gift till the respondent “attained the age of puberty, and the bond till the “whole intromissions had by the tutors in virtue of “said gift, and fully accounted for and paid to the “pursuer.”

Mr. Baikie maintained, in defence, that the tutory fell by the death of Mr. Strong, and that consequently the bond of caution then terminated.

The case came before Lord Newton as Ordinary, who reported it to the Court; and their Lordships, considering the question attended with difficulty, transmitted the following query for the opinions of the other judges:—“Whether the tutory in this case fell by the “death of Mr. Strong?” A note was thereafter sent to the Court by the consulted Judges, stating, “that “before giving an opinion on the question submitted “to them in the case of Baikie v. Stewart and others, “they were desirous of obtaining information with regard to the practice of the Court of Exchequer, both “as to the particular terms on which gifts of tutory “have been granted, where more than one person is “nominated, and whether, where a plurality have been “appointed, applications for new appointments have

“ been made in consequence of death or other inca-  
 “ pacity. The consulted Judges therefore wish that  
 “ the necessary order should be made by the First  
 “ Division to obtain a report from the King’s Remem-  
 “ brancer.” A remit was in consequence made to the  
 King’s Remembrancer, who returned a report in these  
 terms :—“ There was laid before the King’s Remem-  
 “ brancer a remit from the Court of Session, requesting  
 “ him to make a return or report on a note with regard  
 “ to the practice of the Court of Exchequer, both as  
 “ to the particular terms in which gifts of tutory have  
 “ been granted, where more than one person is no-  
 “ minated ; and whether, where a plurality have been  
 “ appointed, applications for new appointments have  
 “ been made in consequence of death or other inca-  
 “ pacity. The Remembrancer begs to observe, 1st,  
 “ That tutory datives and curatory datives, where more  
 “ than one person is nominated, generally, but not  
 “ always, specify a quorum, and it is the practice, when  
 “ the number of the quorum is reduced by death, to  
 “ apply for a new gift. An instance of this kind took  
 “ place in the year 1806 ; but the records of this Court,  
 “ in so far as I can discover, do not afford an instance  
 “ where a gift of tutory granted to more persons than  
 “ one, and where, by the terms of the gift, the nomina-  
 “ tion is neither jointly nor to a quorum of the Barons  
 “ having been applied to for a renewed gift in conse-  
 “ quence of the incapacity or death of one or more of  
 “ the tutors first named. 2. When a gift is granted to  
 “ two persons jointly, and one of them dies or refuses  
 “ to act, or in the case of a lady afterwards marrying,  
 “ by which she becomes in law incapacitated, a new  
 “ gift becomes necessary, and would be granted upon

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“ the tutors observing the rules and directions of the  
 “ statute 28th June 1672. A case of this last kind  
 “ took place in Whitsunday term last. HENRY JAR-  
 “ DINE, King’s Remembrancer.”

On considering this report, Lord Corehouse returned an opinion in these terms :—“ I am of opinion that the  
 “ tutory dative did not fall by the death of Mr. Strong.  
 “ The authority of Lord Stair and Lord Bankton upon  
 “ the subject is express, and the return of the King’s  
 “ Remembrancer seems to be sufficient evidence that  
 “ that authority has been uniformly acted upon.”  
 Lords Justice Clerk, Glenlee, Pitmilly, Alloway,  
 Meadowbank, Mackenzie, Newton, and Medwyn  
 stated, “ We are entirely of the same opinion with  
 “ Lord Corehouse.” Lord Cringletie subjoined, “ In  
 “ consequence of the practice as reported by the proper  
 “ officer of the Exchequer, I am also of opinion that  
 “ the tutory did not fall by the death of Mr. Strong.”  
 When these opinions were laid before the Court, along  
 with the report of the King’s Remembrancer, a motion  
 was made on the part of Mr. Baikie for a more particu-  
 lar investigation as to the practice, which, it was alleged,  
 was not accurately stated in the report. The Court  
 (28th January 1829) refused this motion, for the reasons  
 set forth in the following interlocutor, and in which  
 they also gave judgment on the merits.\*

“ The Lords, upon the report of Lord Newton, and  
 “ having advised the mutual revised cases for the par-  
 “ ties, and consulted with the Judges of the Second  
 “ Division and the permanent Lords Ordinary, and  
 “ heard counsel for the parties on the objection stated

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\* 7 S. & D., 333.

“ by the defender, that the report of the Remem-  
 “ brancer, although accurate as far as it goes, is not  
 “ complete, find that on the 11th of March 1828 this  
 “ Division, on advising cases for the parties, remitted  
 “ the same to the Judges of the Second Division and  
 “ permanent Lords Ordinary to give their opinion  
 “ ‘ whether the tutory in this case fell by the death of  
 “ ‘ Mr. Strong, and to give in the said answer quam  
 “ ‘ primum;’ find that the consulted Judges, before  
 “ answering the above question, desired that this  
 “ Division should give the necessary order to obtain a  
 “ report from the King’s Remembrancer in Exchequer  
 “ as to the practice in such cases; find that this  
 “ Division, on 7th June 1828, did remit to the Remem-  
 “ brancer accordingly; find that on the 17th of June  
 “ 1828 the Remembrancer made his report; find  
 “ that this report was printed and boxed to all the  
 “ judges on the 21st of June; find that this report,  
 “ being a return to the requisition of the consulted  
 “ judges, necessarily and properly became matter  
 “ for their consideration, under the original remit by  
 “ this Division of 11th March, and that no new order  
 “ or remit was necessary to entitle the consulted Judges  
 “ to resume the case, and answer the question put to  
 “ them in said remit; find that the said report by the  
 “ Remembrancer was printed and boxed and moved in  
 “ Court nearly three weeks before the end of that  
 “ session, and therefore when said report was moved  
 “ in Court, and still more before the Court rose, the  
 “ parties had opportunity and time to object to it, as  
 “ either imperfect or inaccurate; find that the case  
 “ was put out in the printed rolls on the very first days  
 “ in the long vacation in July 1828 to be advised on

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“ the 10th of December 1828, along with the opinions  
 “ of the consulted Judges, expected to be put in; find  
 “ that the case accordingly was called on the 10th of  
 “ December, but the opinions not having come in, it  
 “ was delayed; find that on this occasion the parties  
 “ had another opportunity to have objected to the Re-  
 “ membrancer’s report; find that the case was again  
 “ put out in the roll to be advised on the 13th of  
 “ January 1829, but was again delayed, as no opinions  
 “ had been given in, except by Lord Corehouse; find  
 “ that at moving the case on the 13th of January the  
 “ parties had another opportunity of objecting to said  
 “ report of the Remembrancer; — therefore find that  
 “ they cannot now be heard to object to said report,  
 “ or to the manner in which it was brought before the  
 “ consulted Judges, and considered by them; and  
 “ having resumed consideration of the case, with the  
 “ opinions of the consulted Judges, find, in terms of the  
 “ opinion of the majority, that the tutory in question  
 “ did not fall by the death of Mr. Strong, and discern  
 “ in the reduction accordingly; and appoint parties to  
 “ debate on the consequences to follow from this judg-  
 “ ment.”

Thereafter their Lordships remitted the case to Lord Newton to hear parties farther on the remaining points in the cause.

In the meanwhile the respondent and his curators, founding on the deed of factory and the relative bond of caution, raised an action against Stevenson (who had now become bankrupt), and also against his cautioner, the appellant, Scot, concluding for an account of the whole intromissions of Stevenson, from the commencement of the tutory till the expiry of the pupilarity, and for decree

against Scot, as jointly and severally liable with Stevenson for any balance remaining due.

In this action Lord Eldin, on 29th June 1827, “found the defender, Alexander Scot, liable for the balance of the intromissions of Alexander Stevenson under the factory in question,” &c. ; but Scot having reclaimed, and before his reclaiming note was advised, the Court, having pronounced the judgment already quoted in the relative action against Baikie, remitted this cause also to the Lord Ordinary, “ob contingentiam, with power to hear parties as to the consequences which ought to follow from the judgment pronounced by the Court in the case at the instance of Stewart v. Baikie, and to proceed farther,” &c. The case against Stevenson and Scot having been argued before Lord Fullerton, he appointed the parties to give in Cases to himself, and issued this note:—

“After the full discussion which the case has received, it is with great reluctance that the Lord Ordinary issues the above order. But, upon a full consideration of the whole circumstances, he foresees the possibility of great inconvenience, and even injustice, in separating entirely the present case from that depending between the same pursuers and Mr. Baikie, the cautioner for the tutors, which has not been argued before him, and which must now, in all probability, fall to be decided by another Judge.

“It is due to the parties, however, to state the view entertained by him on the points in dispute. If the factory had been granted to a third party by two tutors in their tutorial character, with the implied sanction of the remaining tutor, and had thus been a proper tutorial act, the judgment of the Court, hold-

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“ ing the tutory not to have fallen on the death of  
 “ Mr. Strong, would have been conclusive against the  
 “ cautioner for such factor. But here there is the pecu-  
 “ liarity, that the factory or commission is granted by  
 “ two individual tutors in favour of a third, Mr. Steven-  
 “ son; and Mr. Scot is cautioner for Mr. Stevenson’s  
 “ intromissions, ‘ in virtue of the before-mentioned  
 “ ‘ commission and factory, or as their factor, cashier,  
 “ ‘ or agent, in any manner of way.’ This specialty  
 “ gives rise to two questions: first, whether the fac-  
 “ tory, not being a proper official act of the whole  
 “ tutorial body, did not fall by the death of one of the  
 “ individuals who had granted it; and, secondly, what  
 “ is the extent to which the cautioner is bound?

“ In regard to the first of these points, the Lord  
 “ Ordinary, though with some hesitation, inclines to  
 “ the opinion that the commission may be held in con-  
 “ sequence of the peculiar nature of the appointment of  
 “ the tutors, as ascertained by the judgment of the  
 “ Court, to have been granted by the two tutors and  
 “ the survivor of them, and therefore did not fall by the  
 “ death of Mr. Strong. The second question is attended  
 “ perhaps with still more difficulty. The cautioner is  
 “ bound for Mr. Stevenson’s intromissions in virtue of  
 “ the commission and factory, or as the factor, cashier,  
 “ or agent of the two tutors who granted the factory.  
 “ But Mr. Stevenson being also a tutor himself, and  
 “ whose power in that character was expressly saved in  
 “ that commission and factory, had a right to intromit  
 “ as tutor, which circumstances raise the question,  
 “ whether any, or which, of his intromissions are to be  
 “ held as intromissions in virtue of the factory, for  
 “ which intromissions alone the cautioner was bound?

“ This again seems to lead to an inquiry into the true  
 “ character and effect of the commission or factory;  
 “ whether it should be treated as a commission to a  
 “ third party, whose whole intromissions must be im-  
 “ puted to it alone, or as a mere devolution on one  
 “ tutor by the other two of the whole powers previously  
 “ shared by them all? Now, it appears to the Lord  
 “ Ordinary that this is a point in which Mr. Baikie,  
 “ the cautioner for the tutors, may have a material  
 “ interest, and which does not admit of being separated  
 “ altogether from this case; as, according to the first  
 “ view, Mr. Baikie would, in all probability, have the  
 “ benefit of Mr. Scot’s cautionary obligation, while,  
 “ according to the second, that obligation might pos-  
 “ sibly be construed as merely protecting the two indi-  
 “ vidual tutors who granted the commission, and as not  
 “ available to Mr. Baikie in regard to Mr. Stevenson’s  
 “ intromissions, which intromissions might be held to  
 “ be properly imputable, not to the factory or commis-  
 “ sion, but to his inherent powers as tutor, for the due  
 “ exercise of which Mr. Baikie was unquestionably  
 “ bound. Accordingly, Mr. Baikie’s fourth plea in  
 “ law seems to involve a question of this kind, and  
 “ besides, the remit of the Court in the present case is  
 “ expressly granted *ob contingentiam*, meaning, as it is  
 “ presumed, the contingency of the case with that in  
 “ which the Court had pronounced judgment, being  
 “ the case of Mr. Baikie.”

The Cases having come before Lord Moncreiff, he reported them, and also Cases in the question with Baikie, to the Court, and at the same time issued this note:—

“ The Lord Ordinary regrets that, in this very dif-  
 “ ficult case, he has not had the benefit of a debate. It

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“ had been fully heard, and the Cases had been ordered  
 “ by Lord Fullerton, before it devolved on the present  
 “ Lord Ordinary; and after he had considered the  
 “ cases he found it necessary to make some orders in  
 “ the relative action of Stewart *v.* Baikie, in order that  
 “ both causes might be disposed of at the same time,  
 “ according to the intention of the Court. Both causes  
 “ being now fully prepared, he thinks it expedient to  
 “ report them. They have not been conjoined, the  
 “ interests and pleas in each being in a great measure  
 “ distinct, though so materially connected that they  
 “ ought to be decided together.

“ The points in the case of Baikie are these:—

“ 1. Is the judgment of the Court, reducing the de-  
 “ cree of exoneration to the effect of finding that the  
 “ tutory did not fall by Mr. Strong's death, conclusive  
 “ against its operation as a release to Mr. Baikie?

“ 2. If it is not, is that decree *res judicata* as to the  
 “ termination of Mr. Baikie's obligation as cautioner,  
 “ either at the death of Mr. Strong, or at the date of  
 “ the summons? The Lord Ordinary thinks that it is  
 “ not *res judicata*; 1st, because the judgment may  
 “ have depended on the point on which the Court has  
 “ already reduced it; and 2d, because, though by that  
 “ decision it is settled that the pupil was not without  
 “ tutors, those tutors were the very persons for whom  
 “ Mr. Baikie was cautioner; and therefore a tutor *ad*  
 “ *litem* was indispensable.

“ 3. Did Mr. Baikie's obligation fall by the death of  
 “ Mr. Strong? The Lord Ordinary thinks that there  
 “ is much greater difficulty in this point than the pur-  
 “ suer is willing to allow. It is finally settled that the  
 “ tutory did not fall; but the very peculiar terms of

“ the bond of caution do certainly leave a question of  
 “ importance open, whether the cautioner is liable for  
 “ the actings of two of the tutors, after the death of one  
 “ has removed his superintendence and put an end to  
 “ his obligation of relief. There is great difficulty in  
 “ holding that the tutory was so framed as to subsist,  
 “ and the bond of caution so expressed as to fall. It  
 “ could not be so intended: But whether it was, that  
 “ the bond was framed on a different view of the effect  
 “ of the tutory, or from what other cause, the terms of  
 “ the bond are such as to render it very difficult, under  
 “ the common rules as to cautionary obligations, to  
 “ obviate Mr. Baikie’s plea. The Lord Ordinary does  
 “ not mean to say that he has formed a decided opinion  
 “ that it is good; but at present the only answer made  
 “ by Mr. Stewart is not satisfactory to him.

“ 4. Supposing that the cautioner’s obligation did  
 “ not fall, is Mr. Baikie liable for the intromissions of  
 “ Mr. Stevenson as factor? The Lord Ordinary thinks  
 “ that he is; because, though Mr. Stevenson received  
 “ the money as factor, yet being tutor also, as soon as  
 “ he had it in his hands, he was bound, both as tutor  
 “ and factor, to account for it and pay it to the minor.

“ If it should be found that Mr. Baikie is released,  
 “ the action against Mr. Scot will be of great import-  
 “ ance to Mr. Stewart. But if Mr. Baikie should be  
 “ found still liable, the interest will lie chiefly between  
 “ him and Mr. Scot. The Lord Ordinary, therefore,  
 “ allowed Mr. Baikie to see Mr. Scot’s paper, and to  
 “ put in an argument in that view.

“ The points in *Stewart v. Scot* are these:—

“ 1. Whether the pursuer has a title to found upon  
 “ Mr. Scot’s bond of caution? The Lord Ordinary

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“ thinks that there is nothing in the objection that this  
 “ was not stated as preliminary, because it is equally a  
 “ defence on the merits ; but he is of opinion that the  
 “ plea is not well founded. He apprehends that where  
 “ tutors or trustees have power to grant factories, and  
 “ they do grant a factory, and take a bond of caution  
 “ for the factor’s intromissions, the bond is available to  
 “ the minor or constituent, and that it can make no  
 “ difference that the tutor had previously found caution.  
 “ He has no idea that Mr. Scot’s bond was only taken  
 “ as a protection to Mrs. Stewart and Mr. Strong.  
 “ The question, to what it binds Mr. Scot, is very dif-  
 “ ferent.

“ 2. Whether the factory fell by Mr. Strong’s death ?

“ This is a question of difficulty, and not absolutely  
 “ resolved by the judgment finding the tutory to sub-  
 “ sist ; for the factory being to one of the tutors, it  
 “ cannot be held that it was so a tutorial act that it  
 “ must have subsisted as long as the tutory. If  
 “ Mrs. Stewart had died, it could not have stood, the  
 “ factor being himself sole tutor. The question, there-  
 “ fore, is, whether, as a mandate (clearly different from  
 “ contracts of lease, loan, &c.), it fell by the death of  
 “ one of the grantors necessary to its constitution, or, as  
 “ a tutorial act, subsisted as long as the nature of the  
 “ tutory admitted of it. The point is far from being  
 “ clear ; but the Lord Ordinary is inclined to think  
 “ that it did subsist.

“ 3. Whether, if the factory fell, Mr. Scot is liable  
 “ for Mr. Stevenson’s intromissions, either as tutor or  
 “ agent ? The question whether he would be liable on  
 “ the ground of Mr. Stevenson having acted as agent,  
 “ is not precisely argued by the defender, and is not

“ clear. But the Lord Ordinary is of opinion that  
 “ there are no words in the bond which could make him  
 “ liable for intromissions as tutor; and is inclined to  
 “ think, that, notwithstanding the words as to the  
 “ character of agent, the true spirit and purpose of the  
 “ bond made it dependent on the subsistence of the  
 “ factory.

“ 4. Supposing that the factory did not fall, did  
 “ Mr. Scot’s obligation as cautioner fall by Mr. Strong’s  
 “ death?

“ This seems to be the most important question in  
 “ the cause, and it is certainly attended with difficulty.  
 “ There is nothing in the bond to settle it. Mr. Scot,  
 “ though bound conjunctly and severally with Mr. Ste-  
 “ venson, is so bound expressly as cautioner; and it is  
 “ no solution of the point to say, that if Stevenson was  
 “ liable, Scot is liable: Stevenson must have been liable  
 “ in every event. But the question whether the cau-  
 “ tioner’s obligations subsisted to cover intromissions,  
 “ had after the death of one of those to whom it was  
 “ given, must depend on other principles. The cases  
 “ quoted by the defender are evidently of importance,  
 “ and some of them come very near to the point. And  
 “ again, it would be difficult or impossible to say that  
 “ the cautioner would have continued bound if Steven-  
 “ son had become the sole tutor. On the other side, if the  
 “ tutory and the factory both subsisted, and if the bond  
 “ of caution be held to have been taken for the pupil’s  
 “ benefit, and to be available to Mr. Baikie, it is not  
 “ easy to hold the tutorial act of taking it as having  
 “ become ineffectual de futuro, by the death of one of  
 “ the tutors. The Lord Ordinary has not a very de-  
 “ cided opinion on this question. He has not been able

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“ to get over the general rules applicable to cautioners,  
“ as recognised both in the Scotch and in the English  
“ cases ; but he sees much difficulty in applying them.

“ 5. Whether, if the factory subsisted, all the intro-  
“ missions of Mr. Stevenson must be considered as  
“ falling under it? If special facts to the contrary were  
“ condescended on, this might raise such a difficulty as  
“ that suggested by Lord Fullerton ; but the Lord  
“ Ordinary does not think that it could be maintained  
“ as matter of presumption, that money uplifted by the  
“ factor was not uplifted in that character, but as one  
“ of two tutors.”

When the Cases came before the Court a motion was again made, on the part of the appellant, for a further inquiry in regard to the practice, but this was refused as being too late.\*

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\* The appellant, in his appeal case, averred, that the record of signatures in Exchequer was destroyed by a fire in 1811 ; that the report of the Remembrancer “ was framed from a mere recollection or impression as to the practice, not from the actual examination of any record ;” and in particular, that it “ was not made from any examination of the records of Chancery in Scotland.” He farther alleged, that he himself had searched the latter records from 1st June 1808 to 3d July 1828, and that the following was the result ;—

|  | Tutories dative. |
|--|------------------|
| There are on record - - - - -  | 62               |
| Of these taken to one tutor - - - - -  | 24               |
|  | <hr/>            |
| Remaining appointments to more than one - - - - -  | 38               |
| 1. Of these taken to A., B., C., and the survivors or survivor, there are - - - - -                      | 8                |
| 2. To A., B., C., & D., and a certain number as a quorum, - - - - -                                      | 5                |
| 3. To A., B., C., & D., or the survivors or survivor of them, and a certain number as a quorum - - - - - | 16               |
| 4. To B. & C. jointly - - - - -  | 1                |
| 5. To A., B., & C., as in the present case, and including that gift - - - - -                            | 8                |
|  | <hr/>            |
|  | 38               |

He farther stated that there was no evidence that in any of these cases a failure of any of the nominees arose from death.

Their Lordships (29th February 1832) pronounced this interlocutor in the case against the appellant:—  
 “ Find the defender Alexander Scot liable as cautioner for Alexander Stevenson, factor, appointed by the tutors dative of the pursuer, for all the acts and intromissions of the said Alexander Stevenson as factor foresaid : Find him also bound to relieve James Baikie, the cautioner for the tutors dative, of all responsibility falling upon him on account of the said factor’s intromissions ; and remit to the Lord Ordinary to proceed farther in the cause as to him shall appear just : Find the pursuer entitled to expenses,” &c. In the case against Mr. Baikie the following interlocutor was at the same time pronounced:—“ Find the defender liable, as cautioner for the tutors dative of the pursuer, for the whole intromissions of the said tutors, and of their factor, Alexander Stevenson ; but find the said defender, James Baikie, (in so far as he may be made liable for the intromissions of the said Alexander Stevenson, as factor named by the said tutors,) entitled to relief against Alexander Scot, who became bound as cautioner for the said factor’s intromissions, and remit the cause to the Lord Ordinary to proceed farther in the cause as to him shall seem just : Find the pursuer entitled to expenses,” &c.\*

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Mr. Scot appealed.

*Appellant.*—1. Where there is a gift of tutory to three individuals together, and no survivorship is expressed, the gift falls by the death of any one of them.

\* 10 S. & D., p. 392.

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The general rule in regard to all mandates is, that the mandate terminates by the death of the mandatory; and where the mandate is conferred on a plurality of persons, the presumption is, that reliance is placed upon their united discretion and sagacity; and if that union be dissolved by the death of any one of them, the mandate expires.\* The same principle applies to the office of tutory; for it is in reality a mandate to perform certain duties on behalf of an individual, who is himself incapable of acting. It is true that this principle is not held to apply in the case of tutors testamentary, the reason of which is assigned by Mr. Erskine to be, “the favour of last wills and of minority creates a presumption that the father or mother prefers any of the tutors or curators so named, to those who are pointed out by the law.”† No doubt Lord Stair has a dictum, that in case of tutors dative the office does not fall by the death of one of the nominees; but the decisions to which he refers all relate to the case of tutors testamentary‡; and Lord Bankton merely adopts the dictum of Lord Stair.§ Neither does the practice afford any support to the plea of the respondent. The report of the Remembrancer is inaccurate and incomplete, and the records of Chancery show that there has been no such practice as that alleged. In the Court of Chancery in England the rule is established, that the office falls by the death of one of the nominees.||

2. But, independent of the more general plea that the

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\* Ersk., b. iii. tit. 3. sec. 34, 40.

† Ersk., b. i. tit. 7. sec. 30.

‡ 1 Stair, 6, 14.

§ 1 Bankton, 7, 20.

|| Bradshaw v. Bradshaw, 15th June 1826, Russell's Reports.

tutory terminated by the death of Mr. Strong, the appellant maintains that the factory came to an end, and at all events his bond of caution ceased to be operative, by the death of that gentleman. In interposing as cautioner for the factor, the appellant relied for protection on the circumstance that the factor would be superintended and kept to his duty by those who had appointed him to that office; but a material change was effected by the death of Mr. Strong, and this was practically exemplified by the fact, that at the time of his death the factor was owing no balance whatever, whereas, when his superintending control ceased to exist, the factor failed to account, and became bankrupt with a large balance in his hands. It has accordingly been fixed, in a great variety of cases, that a cautionary obligation addressed to two or more parties in favour of a third, is strictly personal to those to whom it is addressed,—that it falls upon any of these parties ceasing by death or otherwise to have an interest in the matter, is not transmissible to other parties, and is even held to expire by the assumption of other persons as creditors.\*

3. Although there is no action of relief by Mr. Baikie against the appellant, yet the Court of Session have ordained the appellant to relieve that gentleman of his cautionary obligation to the tutors, which was incompetent.

*Respondent.*—1. The decision in the question with Mr. Baikie is conclusive as to the subsistence of the tutory, notwithstanding the death of Mr. Strong; and

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\* Philip v. Melville, 21st Feb. 1809; Elton Hammond v. Nelson, 24th June 1812; Fell on Guarantee, pages 125, 127.

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even if the question be open, this judgment is well founded in law. It is admitted, that, in the case of tutors testamentary, the death of one of the nominees does not vacate the appointment, and therefore it follows that the rule as to joint mandates does not apply; and it is laid down expressly by Lord Stair, that “if there be more tutors either nominate or dative, and no quorum expressed, if some of them die, the office is not void, but the rest of them may act.”\* The same doctrine is stated by Lord Bankton†, and also by Mackenzie.‡ In point of principle, there is no distinction between the nomination by a father, and the nomination by the king; the latter acts in making the appointment as pater patriæ. The decisions of the Court all recognise this principle.§ In like manner the practice of the Court of Exchequer is confirmatory of Lord Stair’s doctrine, as established by the report of the proper officer.

2. The factory did not terminate by the death of Mr. Strong, unless on the supposition that the tutory was thereby dissolved. The granting of the factory was a proper tutorial act; and if the office survived in the persons of the other two tutors, the factory remained effectual until terminated by the bankruptcy of the factor. But if so, then the appellant’s bond of caution must also remain as effectual as it was during the life of Mr. Strong. It is only in those cases where the appoint-

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\* 1 Stair, 6, 14.

† 1 Bankton, 7, 120.

‡ 1 Mackenzie, 7, 72.

§ Young v. Watson, 7th Nov. 1740, Mor. 16,361; Fisher’s children, 2d August 1758, Mor. 14,596; Ellis v. Scott, 14th February 1672, Mor. 14,695.

ment itself falls, that the relative cautionary obligation ceases to exist.

3. No objection was taken in the Court below to the form of the judgment, and there was nothing incompetent in the Court finding the appellant bound to relieve Mr. Baikie; and, at all events, that part of the judgment finding him liable to the respondent is unobjectionable.

LORD CHANCELLOR.—My Lords, this case involves, among other questions of importance to the law of Scotland, one peculiarly deserving your Lordships consideration, namely, whether, upon tutors being appointed by proper authority, if one or more of them shall have died or become incapacitated, or declined exercising that function, the tutory-dative shall continue to exist? Upon this very important question no authority appears in the law of Scotland, so far as judicial decision goes, nor has any case ever been decided upon any other point so related to this, as arguing from the one decision to the other, to furnish authority in point of reason, which should enable us to rule the present case. Two very valuable authorities in the law of Scotland, and one particularly, Lord Stair, are cited. Lord Stair is followed by Lord Bankton, as supporting the proposition, that where there are either tutors-nominate or tutors-dative, though a joint appointment shall not be specified, nor a clause as to a quorum, nor sine quo, nor sine quibus non, introduced, yet upon a supervening incapacity or decease of one of those tutors there is survivorship of the tutorial office to the other tutors, in the case of tutors-dative, as well as in the case of tutors-nominate

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or testamentary. It is, however, important to observe, that although Lord Stair lays down this proposition expressly as to both offices, and cites three or four decisions, yet these decisions relate simply to the case of tutors-nominate or testamentary, and none of them refer to tutors-dative. When those cases are minutely examined, there is nothing, either in the argument from the bench, or at the bar, which can lead us (especially when we examine the more full report in Gosford) to form a conclusion that the Court ever admitted or assumed, much less pronounced any opinion, upon that branch of Lord Stair's dictum which embraces the cases of tutors-dative; and when some of the other decisions are resorted to, it is found that the reasons upon which they appear to have proceeded are such as from their nature are exclusively applicable to and drawn from the circumstances of the appointment of tutors-testamentary. These reasons have reference to the will of the father and his *delectus personæ*, (the return of the mandate to the mandant being in this case excluded by the decease of the mandant,)—the necessity of attending to his last will,—the impossibility of recourse to him in changed circumstances—the preference to be given to whomever he shall have deliberately selected—the exclusion in favour of those appointed by him of all, either tutors-at-law or tutors-dative—and, as arising from all those topics, the propriety of preferring any one of those appointed by the father, even though the others shall cease to act:—These apparently formed the grounds of the decisions in some of those cases; and in others, they actually form the grounds. Accordingly, some of the text writers, particularly Mr. Erskine, (both

in the larger and the smaller work,) have stated, that those are the grounds of the decisions; and it is needless to observe, that every one of those reasons is peculiar to the case of tutors-testamentary, and that no one of them has any place in the case of tutors-dative. It therefore should seem, that we are left with a dictum unsupported by decisions, and which rests not upon the reason supporting the other branch of the dictum as to tutors-testamentary. This leads to the entertaining of a very grave doubt, whether that unsupported dictum really is the law of Scotland. If the whole Court had been unanimous, I should have been slow to offer any opinion that might seem to call in question such a decision; but they are not unanimous;—a learned and experienced authority is found supporting the negative of that proposition. If, again, in default of judicial decision, and of a continuous and uninterrupted stream of authority of text writers, and of reason—if, in default of all this, one had found, upon resorting to the practice of the Court of Exchequer in issuing such orders of appointment, and dealing with such cases, when the fact happens of the decease or removal of one of the several tutors appointed, that it was clear and uniform, then I should have said, that all questions might practically be said to be excluded upon the authority of Lord Stair's dictum. But upon examining that practice, it does by no means appear clear that it exists at all. The question was very accurately framed by the Court of Session, but it is not very explicitly or distinctly answered. The King's Remembrancer certifies to the Court, that no instance is to be found of an application to the Court of Exchequer in such cases. But this we know, that of

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No.12. the sixty odd cases in which tutors-dative have been appointed during the period, (within which, from the accidental destruction of the Exchequer books, we are enabled to institute the inquiry,) only eight of those cases are to be found which have neither the quorum clause, nor the sine quibus clause, nor the sine quo non clause, nor the words conjointly or conjunctly. To those cases, therefore, our inquiry must of necessity be confined; and I understand it to be stated, and not denied, but in terms admitted, that there is no one of those eight cases, in which we have any evidence that the decease had occurred, or that incapacity had supervened; so that, for any thing we can know to the contrary, in no one of those cases can the practice have been decided one way or the other. In order to make cases, in which the practice can give us light, two things must have occurred—first, a tutor-dative must have been appointed, without the word “jointly”—without the quorum clause—without the clause of sine quo non—otherwise the question does not arise; and, secondly, there must have been circumstances in which it could arise, namely, the fact of the decease or the removal having happened. If, in these cases, a vacancy had arisen, and no application had been made to the Court, the practice, to a certain extent, would have coincided with Lord Stair’s dictum; but still the practice would have been imperfect. It would have been imperfect, because the Court itself would never have been resorted to upon the subject. Now, as this seems to be the only aperture through which one can expect any light to be let in upon this very important question, I am disposed to have recourse once more to the Court of Exchequer,

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and to have a further examination made, as to whether or no there be any reason to suppose that, in one or two of those cases, the fact occurred, upon which alone the question could arise, namely, of a vacancy in the tutorial office. My opinion will depend very much, in one view, upon the result of that inquiry; that is to say, if I find the practice in those cases to have been such as is suggested, (but without any proof,) it would certainly very greatly obstruct me in the view which I am now disposed to come to, namely, to reverse the decision of the Court below upon this fundamental ground. It would certainly be very satisfactory if the rest of the case were such as to enable me to advise your Lordships to affirm the decision of the Court below, without raising this question at all; for it is always advisable, more especially in a Court of the last resort, and most especially of all in a Court which is deciding a case, more or less, on foreign jurisprudence, that we should avoid, unless there is a necessity for it, discussing and disposing of questions which do not come before us. But in this case, whatever opinion your Lordships might come to upon the second and third points which are made here, it is quite impossible to affirm the decision of the Court below, without at the same time carrying in its own bosom an adoption of the principle which is necessary to support that decision below; and therefore you cannot affirm upon the second and third grounds, without recognizing the principle, that the tutorial office, in the case of tutors-dative, survives, and therefore this would be a decision, for the first time here, of that point which has now, for the first time, been decided below, if not in the case of Baikie v.

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Stewart. I do not understand that that point has ever been decided in the Court below in any case before Baikie v. Stewart, which is, however, identical with this case of Scot v. Stewart. Upon these grounds, therefore, I fear that it is impossible to withdraw from grappling with that difficulty and deciding that point; and being of that opinion, as at present advised, I shall beg your Lordships to adopt the course I have suggested, of inquiring further with respect to the practice, as far as there is any likelihood of gaining light upon that practice from the Court of Exchequer below. Should I continue to be of the same opinion—for unless the practice shall be certified from the Court of Exchequer to be such as it does not appear to be at present—I shall be disposed to advise your Lordships to reverse the judgment of the Court below. I need hardly add, having stated it so repeatedly, that all reason is most clearly and decidedly against the doctrine that the office of tutor bestowed by the Court, exercising the royal functions in this respect, upon one individual, propter dilectum personæ, in conjunction with another, may be bestowed upon that other, upon whom alone they never would have dreamt of bestowing it. They may appoint the mother, from delicacy towards her, and from respect towards her feelings, or from a wish that she may interpose where it may be expedient, with a view to the benefit of the infant; and even if it is not from respect to her feelings, it may be with a view to that aid, nurture, and other maternal assistance which the child may derive the benefit of during the early stage of infancy; but with her there may be added another in the more manly office of tutor,

which a man only can execute with success and with advantage. The mother may well continue to be the tutrix during the period of the child deriving that aid from her to which I have referred, and yet may ill continue to be the tutrix after others have been withdrawn by their decease or incapacity. The office of tutor is in its very nature joint, whether the words of junction be used or no; and the party deceased may be the very party upon whom principally, in the vast proportion of cases, the Court devolved the exercise of those functions, and the party to which it looked, and not to the other. It is perfectly clear that there is a great difference between this case and that of tutors-testamentary; because there, regard being so constantly and exclusively had to the will of the parent—the will of the parent being, according to the civil law (and which is the foundation of the whole of the Scotch law upon the subject), the governing rule of the Court, it is followed into all its consequences and ramifications; and accordingly that is the point upon which these cases, relied upon by Lord Stair, are all built; namely, that the ultimate decision and choice by the father is to be preferred, in all cases where any portion of it remains, and where even one part of it remains, though the other part is taken away. Though you may say non constat that he would have appointed one, if the other had not been added, yet it was for him to state the difference—it was for him to state the jointure—it was for him to say sine quo non, or sine quibus non; and as he has not said so, the Court will assume that he preferred even one of those, if all could not be had, to any other person whom the law might appoint, or whom the Court might appoint. Upon these grounds I shall be disposed (un-

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less the practice shall be found to be otherwise than there is reason to suppose that the inquiry will show it to be) to advise your Lordships to reverse the decision of the Court below. This supersedes the necessity of my entering upon the other two branches of the case. I think, even if the first preliminary question could have been got over on the part of the respondent, and in support of the judgment, I should have very great doubts. But it is unnecessary for me to broach that question. It is a case of very great difficulty,—it is admitted by the Court below to be surrounded with difficulty,—it is admitted, that, even if the tutorial office shall be allowed to have survived, the questions that remain, so very far from being clear, are subjects of very great difficulty. That being the case, perhaps, had it not been for the other opinion which I am disposed to hold upon the preliminary fundamental question, I might have been inclined to say, that there was no sufficient ground for reversing upon these second and third points; for, considering that our views in this country, in these matters, exceedingly differ from some of the views that appear to have guided their Lordships, that, perhaps, would not be a sufficient ground for reversing the decision. But I am relieved from the necessity of entering into those second and third branches of the case, by the very strong opinion which I have come to reluctantly, of differing from the majority of the Judges of the Court below.

The House of Lords ordered and adjudged, That the several interlocutors complained of in the said appeal be and the same are hereby reversed: And it is declared,

That the tutory expired with the death of Thomas Strong, one of the tutors, and that the survivors did not take the office : And it is further ordered, That, with this declaration, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be consistent with this judgment.

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GEORGE W. POOLE—

, Solicitors.



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No. 13.

ROBERT WEIR, Appellant.

GAVIN GLENNY, JAMES M'ROBBIE, and ROBERT  
M'ROBBIE, Respondents.

*Jurisdiction.*—Question, Whether a sheriff can competently entertain a plea in defence against an application for interdict, that the defender had, by implication from the terms of a deed, a right of road, and which plea was not confined to the point of possession, but embraced that of right ?

*Property—Servitude.*—Three parties agreed that a canal or mill-lead should be made through their respective properties to propel machinery in works belonging to them, to be maintained at the expense of each, so far as it passed through his lands ; but there was no express stipulation as to any right of access along the banks through their several properties : Held (reversing the judgment of the Court of Session,) that the proprietor of the ground on which the road was formed had right to prevent the others from using it, except in the case of obstruction in the water of the mill-lead or actual damage arising to their works.

*Interdict.*—Interdict refused, where it was not proved that the party complained of had done or threatened to do any thing inconsistent with the rights of the complainer.

1ST DIVISION.

Lord Newton.

THE river Carron, in Stirlingshire, runs with a rapid descent, from west to east, through property which belonged in 1801 to Mr. William Morehead of Herbertshire, Mr. John Reid of Bonnymill and Tamaree,

and Mr. Archibald Napier of Randolph-hill. The lands of Mr. Morehead were situated on the north side of the river (with the exception of a part to be immediately mentioned), and those of Mr. Reid and Mr. Napier on the south side. From the rapid descent of the stream, it occurred to those gentlemen that a valuable power of water might be obtained by forming a damhead across the Carron, from Mr. Morehead's property on the north to that of Mr. Reid's on the south, and cutting a canal or water-lead from that point through Mr. Reid and Mr. Napier's lands, and also through a small pendicle belonging to Mr. Morehead, called Stoneywood, all on the south, and discharging it into the Carron at that latter point. On this pendicle Mr. Morehead had erected a paper-mill. To accomplish the above purpose, those three gentlemen, on the 10th of August 1801, entered into an agreement, in which they set forth, that they had "agreed that a dam-dike shall be built across " the river Carron, above Tamaree Linn, from the " lands of the said William Morehead, on the north " side of the river, to the lands of the said John Reid, " on the south side thereof; and that a cut or canal, " five feet wide and two feet and a half deep, shall be " made from the said dam-dike through the lands of " the said parties, on the south side of the said river " Carron, in such a direction as shall be found to be " most suitable for all the said parties, to the present " mill-dam of the paper-mill at Stoneywood, belonging " to the said William Morehead, which lands above " mentioned are situated in the parish of Denny and " shire of Stirling; and that the said parties shall have " full power and liberty to erect such mills as they shall " think proper upon the sides of the said canal, each of

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“ them within his own property; and which dam-dike  
“ and canal shall be made and constructed according  
“ to the following terms and conditions: — 1st, The  
“ said dam-dike shall be made and erected by the said  
“ John Reid at his own expense; and the cut or canal  
“ therefrom to the march between the said Archibald  
“ Napier’s lands and the lands of the said William  
“ Morehead shall be made, and the expense thereof  
“ defrayed, by the said Archibald Napier and John  
“ Reid, each of them being obliged to conduct the same  
“ through his own lands, and the said William More-  
“ head’s tenant shall make the said cut through his own  
“ lands to the mill-dam of Stoneywood paper-mill at  
“ their own expense; and the said cut or canal shall be  
“ so constructed as to deliver at the march between  
“ the lands of the said William Morehead and Archi-  
“ bald Napier the whole water contained in the said  
“ canal, at a height or with a fall of at least ten feet  
“ above the present surface level of the foresaid mill-  
“ dam of Stoneywood paper-mill; and the expense of  
“ maintaining and repairing the said dam-dike shall be  
“ defrayed by the said three parties equally in all time  
“ coming; but the said John Reid hereby engages  
“ and binds himself to relieve the said William More-  
“ head of his proportion of the said repairs for the sum  
“ of 10s. sterling annually, which sum the said William  
“ Morehead binds himself to pay to the said John Reid  
“ at the term of Martinmas yearly, beginning at Mar-  
“ tinmas 1803; and the said John Reid and Archibald  
“ Napier oblige themselves to maintain the said canal  
“ in all time coming, each of them so far as it passes  
“ through his own lands, and no further. 2dly, The  
“ said John Reid hereby binds himself to commence

“ the said operations within three days of the last date  
 “ of this agreement, and to continue to carry on the  
 “ same till they are completed; and both he and the  
 “ said Archibald Napier oblige themselves to have the  
 “ same completed, each for his own part of the said  
 “ work, on or before the 1st day of August 1802.  
 “ 3dly, The said Archibald Napier and John Reid are  
 “ hereby expressly excluded and debarred from erect-  
 “ ing any paper-mill or mills on the foresaid canal, nor  
 “ shall they have any right or liberty to erect any mill  
 “ for making gunpowder, or any other works that the  
 “ laws of the country would prohibit; and that in any  
 “ mills or works which they may erect, they shall not  
 “ suffer or allow any ashes, rubbish, or other nuisances,  
 “ to be thrown into the said canal, which may be  
 “ hurtful to the washing of paper, or other operations  
 “ in the said paper-mill at Stoneywood; neither shall  
 “ the said Archibald Napier nor John Reid, at any  
 “ time, or for any space, be at liberty to interrupt the  
 “ course of the water in the said canal, so as to stop or  
 “ injure the operations in the said paper-mill. 4thly,  
 “ The said William Morehead consents and agrees to  
 “ allow the said Archibald Napier and John Reid, their  
 “ tenants and others, the privilege of a road for all  
 “ carriages, horses, &c. going to or from the different  
 “ mills or buildings which may be erected by them on  
 “ their grounds, or for any other purpose the parties  
 “ may require, to be made at their expense, through  
 “ his property, so as to go into the end of the present  
 “ road used from the said paper-mill, up to the public  
 “ high road leading to Denny, providing that the said  
 “ road shall not hurt the conducting of the water in  
 “ the said canal from the march aforesaid to the said

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“ paper-mill, the said Archibald Napier and John  
 “ Reid being obliged, at their own expense, to main-  
 “ tain the said road, and also being obliged to make a  
 “ sufficient fence along both sides of the said road at  
 “ the same time the road is made, the said fences being  
 “ afterwards to be maintained by the said William  
 “ Morehead or his tenants.” And the deed was sub-  
 “ scribed, “ under this declaration, that it is understood  
 “ by all parties that the water in the canal hereby  
 “ agreed to be made shall be delivered at the march  
 “ between Mr. Morehead and Mr. Napier’s lands, with  
 “ an additional fall of ten feet more than the present  
 “ fall, but not ten feet above the present surface level  
 “ of the dam of Stoneywood paper-mill, as above  
 “ expressed.”

The canal was accordingly formed; and thereafter a corn-mill was erected on the lands of Tamaree belonging to Mr. Reid, and lower down a wool-mill and paper-mill were erected on the lands of Mr. Napier, both of which were situated between the corn-mill and Mr. Morehead’s paper-mill. Thereafter Mr. Napier conferred on Mr. Reid a right of road from Mr. Reid’s corn-mill through Mr. Napier’s lands to the highway. The appellant Weir acquired right from Mr. Reid to the lands of Tamaree, and to the corn-mill, and the water-lead and road, as possessed by Mr. Reid. He also became tenant, under a lease from Mr. Morehead, of the paper-mill at Stoneywood; and he was then in possession of the mills situated at the western and eastern points of the canal. The respondents, M’Robbies, had acquired right to the paper-mill belonging to Mr. Napier, and the respondent Glenny was the tenant and possessor of it.

In 1829 the appellant presented a petition to the sheriff of Stirlingshire, setting forth, that Glenny “ had  
 “ repeatedly since he entered on possession, and parti-  
 “ cularly on the 28th day of February last, pretending to  
 “ have an unlimited right to the said water, and to  
 “ raise the dam-sluice at pleasure, most unwarrantably,  
 “ by himself, and others in his service, trespassed on  
 “ the said lands of Tamaree, and without any authority  
 “ from the petitioner, and others interested in the said  
 “ water, or any complaint that the requisite supply of  
 “ water was in any way withheld or interrupted, raised  
 “ the sluice of the said dam, whereby the said cut or  
 “ canal was overflowed, and the banks thereof in several  
 “ parts were broken down by the overwhelming weight  
 “ of water thus let loose, to the serious damage of the  
 “ petitioner’s property; that, farther, the said Gavin  
 “ Glenny has, by himself, and others in his service,  
 “ been in the practice of using a road which runs along  
 “ the north side of the foresaid cut or canal, to which  
 “ the petitioner and his tenants have exclusive right  
 “ as private property, as acquired by the petitioner’s  
 “ predecessor, the said John Reid, by virtue of a feu  
 “ contract from the said deceased Archibald Napier,  
 “ and wherein the said feuar was taken bound to be at  
 “ the sole expense of maintaining and enclosing the said  
 “ road for his own use.”

He therefore prayed for warrant of service “ upon  
 “ the said Gavin Glenny, and also upon the said  
 “ James M’Robbie and Robert M’Robbie, for their  
 “ interest as proprietors; and to find that the said  
 “ defenders have no right, in virtue of the said  
 “ agreement or otherwise, to enter upon the peti-  
 “ tioner’s said lands of Tamaree, or any part there-

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“ of, or to use the same, or the foresaid road acquired  
 “ by the petitioner’s predecessor, for the use of him-  
 “ self, and his successors and tenants in Tamaree mill;  
 “ and also to find that the said defenders have no  
 “ right or title to interfere with the sluice of the dam,  
 “ or in any manner to increase the flow of water  
 “ through the said cut or canal to any greater height  
 “ than two feet and a half, as stipulated by the foresaid  
 “ agreement; to interdict, prohibit, and discharge the  
 “ said defenders, in all time coming, from entering  
 “ upon, or otherwise interfering with, the petitioner or  
 “ his tenants in the possession of his said lands, or from  
 “ using the same as a road or passage, upon any pre-  
 “ tence whatever; and also to interdict and discharge  
 “ the said defenders from raising the sluice of the fore-  
 “ said dam, or otherwise interfering with the height  
 “ thereof, beyond the stipulations of the foresaid agree-  
 “ ment: Farther, find that the road before mentioned,  
 “ acquired as aforesaid, is a private road, in the use of  
 “ which the petitioner has an exclusive title; and,  
 “ therefore, to interdict and discharge the said defen-  
 “ ders, and all others their servants, from using the  
 “ same in all time coming.”

In support of this petition he averred, that since the formation of the canal it had been maintained and kept in repair by Reid and Napier, and their respective successors, or their tenants, in so far as the same passed through their respective lands, and no farther, and to the exclusion of all interference by the one party with the other; that Reid, as upper proprietor and owner of the ground on which the sluice to the dam was erected, held, while he remained proprietor, the key of the sluice (which was constructed

and maintained at his expense), and the appellant's tenant in the corn-mill had the custody of the key, and regulated the sluice conformably to the stipulations of the agreement in favour of all the parties; that on different occasions, and particularly on the 28th of February 1829, or a day or two preceding that date, the respondent Glenny, without leave asked or given, by himself and his servants, passed into the lands of Tamaree, and there, by forcible means, raised the sluice so as to discharge a greater quantity of water than the canal could contain, and by the overflow, the retaining wall of the canal next to the Carron upon the appellant's lands of Tamaree, and near to the sluice, was burst and broken down, whereby the water escaped, and the supply of water necessary for moving the machinery of the corn-mill was cut off.

In defence, Glenny denied that either he or his servants, on the 28th of February, raised the sluice of the dam; and stated, that on that day the usual supply of water did not come, whereupon his servants, without his knowledge, went to ascertain the cause of the falling off of the quantity, and discovered that an old dike on the lands belonging to the appellant had given way, and that a quantity of stones had fallen into the canal, whereby the canal was choked, and the water made to overflow its banks.

M<sup>r</sup>Robbies, stated, that they had no wish to interfere with the appellant or his lands, so long as the stipulated supply of water was allowed to flow to their machinery; but they maintained, that if the water were interrupted, they had a right to go along the banks of the canal to ascertain where the interruption occurred, and, if they thought proper, to remove it. This, they alleged, they were entitled to do, in the same way as the proprietor

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of a fishery is entitled to use the banks of the river for all the necessary purposes of fishing.

All the respondents averred, that ever since the canal was formed the proprietors, and their predecessors and tenants of the respective mills had been in the constant practice of going along the road in question to the dam-head, for the purpose of lifting the sluice or letting it down, and of using the road when it was found necessary to repair the dam-dike, or clean the canal; that the road was the only one to the dam-dike; that it was impossible to go and repair it, without passing through the appellant's property; and that the road was left and kept open, in terms of the agreement, for the purpose of allowing the proprietors and tenants in the respective mills to use it in repairing the dam-dike and sluice. They also maintained, in point of law, that it was incompetent for the Sheriff to entertain the complaint, in so far as it prayed for a declaratory finding relative to heritage, viz. that the respondents had no right to use or interfere with the dam and sluice, or the access thereto; and, at all events, that they were entitled to a possessory judgment.

The Sheriff-substitute pronounced this interlocutor: — “ Finds that there is no incompetency in the form  
 “ or conclusions of the action, therefore repels the ob-  
 “ jectations thereto: Finds that the rights of parties will  
 “ fall to be determined according to the legal interpre-  
 “ tation to be put on the articles of the agreement  
 “ founded on in the complaint; and that the allegations  
 “ by the defenders regarding what may have taken  
 “ place between the parties, or their predecessors, so  
 “ far as at variance or inconsistent with the rights  
 “ thereby acquired, and obligations imposed, are irre-  
 “ levant, and must be held to have proceeded from

“ mutual accommodation, or motives of friendship and  
 “ expediency : Finds it clear, from said agreement, that  
 “ both parties have an interest in the whole cut or canal  
 “ in question, and a right to the water flowing through  
 “ it from one extremity to the other ; and finds that  
 “ this interest, and the obligations imposed on each of  
 “ the parties, necessarily imply a right in both to pass  
 “ along the whole course of the canal, to ascertain that  
 “ the terms of the said agreement are duly complied  
 “ with, and, if not, to enable them to enforce com-  
 “ pliance therewith on the part of each other : Finds  
 “ that nothing relevant has been stated by the defenders  
 “ to infer a right in them to make use of any road  
 “ through the pursuer’s lands, farther than may be  
 “ absolutely necessary as a communication along the  
 “ canal for the purposes above referred to, or to inter-  
 “ fere with the sluice of the dam, so as to increase the  
 “ flow of water to a greater height than stipulated by  
 “ the agreement.” But, before farther answer, he al-  
 lowed the appellant a proof of his allegations as to the  
 occurrences on the 28th of February, and to the respon-  
 dents of their possession, as alleged by them, of the  
 road.

Thereafter, on advising the proof, he pronounced  
 this other interlocutor : — “ Finds, from the evidence  
 “ adduced, that the occupiers of all the mills supplied  
 “ with water by the cut or canal in question have been  
 “ in the practice, without interruption, of raising and  
 “ lowering the sluice at the dam-dike, as occasion re-  
 “ quired ; and finds, that as no arrangement was made  
 “ by the parties to the agreement founded on in the  
 “ complaint respecting the regulating of the sluice,  
 “ each was entitled to exercise his right in this manner :  
 “ Finds it proved, that at the period mentioned in the

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“ sixth article of the pursuer’s condescence, some of  
 “ the defenders servants passed into the pursuer’s lands,  
 “ and towards the place where the water burst through  
 “ the banks of the canal: Finds it not proved, that on  
 “ the day this occurred the defender, or any of his  
 “ servants, had raised the sluice: Finds it sufficiently  
 “ instructed, that at the time there was no greater  
 “ quantity of water in the canal than was necessary for  
 “ the defender’s mill, and that the injury occasioned to  
 “ the canal was not so much owing to the quantity of  
 “ water in it, as to the insufficiency of the bank at the  
 “ place it gave way, and to the extraordinary pressure  
 “ upon it, caused by the water being impeded in its  
 “ free course by the quantity of stones which fell into  
 “ the canal a little below the spot: Finds it sufficiently  
 “ proved, that there has always been an open commu-  
 “ nication to the dam-dike and sluice from the lower  
 “ mills, by which the proprietors or occupiers thereof  
 “ have been in use to proceed to the dam-dike to  
 “ repair the same and clear away sand, which some-  
 “ times accumulates at the sluice; and that they have  
 “ used this communication at other times, when deemed  
 “ necessary; and that it is impossible for the defender  
 “ and his servants to go along the canal to the dam-  
 “ dike or sluice, for the purpose of repairing the same  
 “ or otherwise, without passing through the pursuer’s  
 “ lands by the road in dispute, which is the only com-  
 “ munication from the lower mills thereto: On the  
 “ whole, finds that the pursuer has failed to prove that  
 “ the defender has acted illegally or unwarrantably,  
 “ and therefore assoilzies him from the conclusions of  
 “ the complaint, and decerns; and finds the defender  
 “ entitled to expenses, subject to modification.”

To this judgment the sheriff having adhered, the

appellant brought the case into the Court of Session by advocacy; and the Lord Ordinary, on the 21st of June 1831, pronounced the following interlocutor:—"Advocates the cause: Finds that it was not competent to the sheriff to determine, from the terms of the contract alone, and without any reference to the possession, that the advocator's property is burdened with the servitude of a road, and that any judgment in the present cause can only be of a possessory nature: Finds it not proved that the occupiers of the lower mills had possessed a road or access to the dam-head, or been in use to regulate the sluice there, for seven years previous to the commencement of this action; and that, on the contrary, it is proved that any possession by them does not reach back for nearly so long a period: Finds that as the respondents have no express grant of servitude, or decree of declarator to this effect, and when they have had no possession sufficient to entitle them to a possessory judgment, the advocator, as proprietor of the ground, was justified in applying for an interdict to prevent them or their servants from using the road in dispute; and in so far grants the interdict craved; also grants the interdict craved as to the use of the road to Tamaree Mill, acquired by the advocator's predecessor, by feu contract, from the late Archibald Napier, the respondents making no claim thereto, and decerns: Finds it unnecessary to grant any interdict as to the regulation of the sluice, the advocator's right to the sole regulation following from his exclusive possession of access thereto: Finds the advocator entitled to expenses, subject to modification," &c.

"*Note.*—The contract is quite silent as to any road or

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“ access to the dam-head ; and if the present action were  
 “ the proper one for determining whether a right to such  
 “ a road can be implied from the provisions of the con-  
 “ tract, the Lord Ordinary would have great difficulty in  
 “ arriving at the conclusion the sheriff has done. Where  
 “ servitudes are essential to the enjoyment of an ad-  
 “ mitted right, they may be inferred from it, as the  
 “ right of a road to a moss follows necessarily from a  
 “ servitude of casting peats there ; but there seems no  
 “ necessity, in such a case as the present, that the  
 “ servants at all the mills should interfere in the  
 “ regulation of the sluice, or that there should be a  
 “ common road along the whole course of the mill-lead.  
 “ Take, for example, the mills on the Water of Leith.  
 “ The mill-lead proceeding from the dam-head imme-  
 “ diately below the village of the Water of Leith, after  
 “ serving several mills belonging to the corporation of  
 “ bakers, supplies water for the mills at Stockbridge,  
 “ Silvermills, and Canonmills, and does not join the  
 “ river till a great way below. It was never thought of  
 “ (the Lord Ordinary presumes), that the occupiers of  
 “ all these mills, and their servants, had a right to go  
 “ to the dam-head and alter the sluice at their pleasure ;  
 “ and the lead passes in many places through private  
 “ property, completely enclosed so as to admit of no  
 “ road or passage along the banks. The owners of the  
 “ lower mills, in the present case, have a sufficient  
 “ security for the supply of water, in the obligation to  
 “ furnish it under which the advocator lies by the  
 “ contract ; for if he shall, either by neglecting the  
 “ dam-head, to which from his situation he is primarily  
 “ bound to attend, by improper management of the  
 “ sluice, or allowing the lead within his ground to get

“ into disrepair, so that the proper supply is not sent  
 “ down, he may be liable in the whole damage sus-  
 “ tained.\*

“ As to the possession, it seems clear from the proof,  
 “ and particularly from the evidence of Mr. Charles  
 “ Laing and Mr. Munnoch, that for many years after

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\* In regard to this matter it was stated by the respondents, in their appeal case, that in consequence of the Lord Ordinary's observations, particular inquiry was made into the usage of the mills to which his Lordship referred, and it was ascertained, and afterwards conceded on the part of the appellant, when the cause was argued before their Lordships of the First Division, that the Lord Ordinary's impression was entirely erroneous. On the contrary, it was ascertained that the proprietors, or their tenants, of the numerous mills, above twelve in number, on the Water of Leith, from the dam-head at the village of the Water of Leith, at the Dean, down to Bonnington, have access to the dam-head, and a right to regulate the sluice and supply of water as occasions may require. As, in this case, all the proprietors of mills on the line of the canal have a common right in the dam-head, and in the canal itself, there is no special agreement or regulation as to the mode of supplying the water. No one has a controlling power over the others; the right in all and each of the owners of mills is the same, and so is the necessary check or control. There is a standard height, beyond which it is not lawful to raise the sluice, but to that standard height any one proprietor may raise it at any time; and for that purpose, besides a common key, which lies at the village of Water of Leith, for regulating the sluice, several of the mills, particularly those of Canonmills and Stockbridge, have keys of their own, in case of the common key being mislaid or injured. It is moreover true, as stated by the Lord Ordinary, that the lead passes, in many places, through private property, completely inclosed, so as to admit of no road or passage along the banks. In those places there is no regular public road or foot way, but, nevertheless, the proprietors of the mills and their tenants do, upon every necessary occasion, go into the inclosed grounds referred to, for the purpose of removing accidental obstructions, and cleaning out the lead. It is generally cleaned out at stated periods, once or twice in the year, besides on other occasions when, from accident, repairs are necessary. The expense is defrayed by the proprietors of the mills or their tenants, and not by the proprietor through whose lands the aqueduct passes. It is the individual always who hath the benefit of the aqueduct who is liable to maintain it, and also for any injury which may be done by it to the adjacent grounds. Lord Moray and the other proprietors, through whose grounds the aqueduct from the Water of Leith passes, have never questioned the right of the owners of the mills to pass along the banks of the lead, from Bonnington to the dam-head, for the purpose of regulating the supply of water when necessary, and to maintain the lead itself in repair.

No.13. “ the date of the contract the occupiers of the lower  
 “ mills claimed no right of access to the dam-head or  
 7th April “ of regulating the sluice; and that the road now  
 1834. “ demanded, though used by the owner of the upper  
 WEIR “ mill in going to the sluice, was frequently shut up  
 v. “ by the field being ploughed to the very edge of the  
 GLENNY “ lead, and Laing states that this was the case in 1823  
 and others. “ and 1824, being within five years of the commence-  
 “ ment of the process. It appears also from the  
 “ deposition of William Downie, that there was but one  
 “ key to the sluice till about four years from the date of  
 “ his examination; and that this key belonged to the  
 “ upper mill, is shown clearly by the evidence of  
 “ Robert Forrest, tenant there. He depones, that  
 “ when he and his brother entered to the mill (which  
 “ was at Whitsunday 1824), the key was amissing, and  
 “ was found in the possession of Mr. Laing, then tenant  
 “ of the respondents mill, a thing natural enough,  
 “ since Laing had possessed the upper mill immediately  
 “ before their entry; that after some wrangling, and  
 “ an application to the advocator, the landlord, it was  
 “ restored to them, and that from this time he and his  
 “ brother had the sole regulation of the sluice till the  
 “ other mills got keys. The occupier of the wool-mill  
 “ seems first to have got one, and the respondent  
 “ Glenny at a later period, which, from Muirhead’s  
 “ evidence, would appear to have been little more than  
 “ a twelvemonth before the dispute. Having thus  
 “ procured keys, it appears that the workmen at these  
 “ lower mills were in the practice of going to the sluice,  
 “ and raising or lowering it as they thought proper,—  
 “ a practice which seems to have been permitted by the  
 “ Forrests, though Robert depones that their landlord,

“ on getting back the key from Laing, had charged  
 “ them to let no person interfere with the sluice. There  
 “ are several witnesses who speak as to the existence,  
 “ from the date of the contract, of a path to the dam-  
 “ head ; but as such path was necessary for the occu-  
 “ piers of the upper mill, its existence proves no right  
 “ in the lower mills to the use of it.

“ On the whole, the Lord Ordinary is satisfied that  
 “ there was no possession by the occupiers of the lower  
 “ mills, or interference by them with the sluice, which  
 “ was not precarious, and depending on the will of the  
 “ owner of the upper one, beyond four years from the  
 “ commencement of the action, and that of the respon-  
 “ dents does not reach back nearly so far.”

Thereafter the respondents gave in a reclaiming note to the First Division of the Court, who, on the 4th of February 1832, pronounced this interlocutor:—“ The  
 “ Lords advocate the cause ; and in respect, 1st, that  
 “ by an agreement entered into, of date 10th August  
 “ 1801, between Mr. Morehead of Herbertshire,  
 “ Mr. Napier of Randolphill, and Mr. Reid of Bonny-  
 “ mill, it was agreed that a dam-dike should be erected  
 “ across the river Carron, and that a cut or canal  
 “ should be made of certain dimensions through  
 “ the lands of the parties in such a direction ‘ as should  
 “ ‘ be found most suitable for all concerned,’ and that  
 “ the parties ‘ should have full power and liberty to  
 “ ‘ erect such mills as they should think proper upon  
 “ ‘ the sides of the canal, each within his property,’—  
 “ by which agreement an operation was undertaken  
 “ and executed for mutual benefit and advantage, and  
 “ in which all were jointly interested ; 2d, in respect  
 “ that such mutual contract and agreement necessarily

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“ imposes on all concerned an obligation to implement  
 “ what has been respectively undertaken, and creates a  
 “ legal interest in all to whom it belongs, to see that it  
 “ is so done ; 3d, in respect that a contract entered into  
 “ for mutual benefit and advantage also necessarily  
 “ supposes such concessions of right, and such permis-  
 “ sions, hinc inde, as may enable parties to support  
 “ their agreement, and that the law of Scotland always  
 “ prefers the preventing of injury or damage to any  
 “ future reparation by indemnification in the way of  
 “ damages ;—therefore recal the interlocutor of the  
 “ sheriff and of the Lord Ordinary, and find, first,  
 “ that in consequence of the foresaid agreement the  
 “ respective parties concerned, or persons properly  
 “ authorised by them, have a right to pass along the  
 “ banks of the cut or canal to examine the same, and  
 “ see that it is kept in proper repair by all concerned,  
 “ and that the stipulated quantity of water is supplied  
 “ to the parties interested, and so as either to prevent  
 “ apparent injury, or to remedy such when it does  
 “ happen as speedily as possible, but for no other end  
 “ or purpose: Second, Find that such right of passing  
 “ along the banks of the cut or canal, for the purposes  
 “ above mentioned, is not to be exercised unnecessarily  
 “ or nimiously; and if any such improper exercise of  
 “ the right should be attempted, reserve to all concerned  
 “ right to complain to the Judge Ordinary thereupon:  
 “ Find, in the whole circumstances of the case, no  
 “ expenses due to either party, and decern.”\*

Weir appealed.

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\* 10 S. & D., p. 290.

*Appellant.*—The interlocutor is incompetent, because it has decided on the rights of the parties in regard to an heritable property. It is fixed law that no inferior Judge can decide on a question of heritable right, where there are either opposite titles in competition, or where the existing titles are of doubtful construction. In all such cases the jurisdiction of the inferior Court is limited to the question of possession for the seven years preceding the action. If such possession shall be proved to have followed on a title *primâ facie* sufficient, the possession must be supported, leaving the party who conceives that there are grounds for setting aside this possessory and *primâ facie* right or title to pursue his remedy, by action of declarator or reduction, in the supreme Court ; and as such action is competent in the supreme Court alone, it follows as a necessary consequence, that no action originating in the inferior Court can, when carried by appeal to the supreme Court, be converted into a declarator or reduction.\*

But in this case, although the action was perfectly competent, yet the defence resolved into an assertion of right to a heritable subject, which could only be maintained in an action of declarator. There was neither title nor proof of possession adduced, to warrant any possessory judgment in favour of the respondents†, and seven years possession is requisite.‡ Here, although there is no express title of any kind, the Court have by their judgment sustained a title in favour of the respondents.

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\* Erskine, b. i. tit. 3. sec. 19., b. iv. tit. 1. sec. 50.

† Buchan against Carmichael, 25th Nov. 1823, 2 S. & D. 526, new ed. 460 ; Hunter against Maule, 26th Jan. 1827, 5 S. & D. 238, new ed. 222 ; Saunders against Reid, 26th Feb. 1830, 8 S. & D. 605.

‡ Hamilton against Tenants of Overshields, 13th Dec. 1661, Mor. 10618. Ersk. b. iv. tit. i. sec. 50.

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But it is said that this is a question of construction of a contract, and that it was as competent for the sheriff or the Court of Session to determine what was necessarily implied, as what was expressly conveyed by the agreement. This would destroy the distinction between declaratory and possessory actions, for every declarator in regard to titles necessarily implies a question of construction; and nothing can be more clear, both in principle and in practice, than that the inferior Judge is competent only to the question of possession.\* If it were competent for him to give any instrument or title regarding heritable property a construction contrary to the possession, the rule requiring seven years possession would be nugatory. The appellant therefore maintains that the interlocutor is incompetent, and that decree should have been pronounced in terms of the prayer of the petition, reserving to the respondents to insist in an action of declarator.

But, supposing it to be competent to decide the question as if it had been raised in a declaratory process in the supreme Court, the judgment is erroneous on the merits. It does not proceed upon any express agreement to give a right of passage, but upon an implication that such a right of passage must have been intended by the parties. The reasons assigned for this implication are groundless, whether considered with reference to the object which the parties had in view, as matter of fact, the contract which they made, or the possession which followed upon it, or the principles of law in regard to the right of property.

It cannot be maintained that the formation of an arti-

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\* Watson against the Fleshers of Glasgow, 20th Nov. 1824, Fac. Col.

ficial canal through the ground of separate proprietors necessarily infers a right to them all to pass through the ground of each proprietor, from one end to the other, to see that there is no obstruction, and that it is kept up in terms of the agreement. It may be conceded that there are rights conveyed, and obligations created, which necessarily imply others, as in the case put by Erskine\*, of a feu granted to a vassal, who, in order to pass to it, must go through the ground of another. There the legal right is put upon the case of absolute necessity. "But," he adds, "it would be both unjust in itself, " and most destructive to the public quiet in its con- " sequences, to extend that right, which is founded in " necessity, to all convenient passages, or to roads " by the nearest line, or through different parts of " the grounds belonging to the conterminous pro- " prietor."† Even if there had been any necessity for a mutual right of interference and regulation some arrangement for that purpose must have suggested itself to the parties, which would have formed part of the contract. But it was not even judged expedient to stipulate that a confidential person should be nominated by all concerned to attend to this matter; and the experience of a great many years established the perfect acquiescence of all concerned in the arrangement, whereby the proprietor of the upper mill, (who had access through his own grounds,) had the sole custody of the key of the sluice. It was only within four years before the action was raised (being twenty-seven years after the contract was made)

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 \* Erskine, b. ii. tit. 6. sec. 9.

† Stair, b. ii. tit. 7. sec. 10.

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that any of the proprietors of the other mills were allowed as a matter of accommodation, and not of right, to have separate keys of their own; and indeed the path was frequently shut up by the field being ploughed to the very edge of the lead.

Neither can it be maintained, as a general proposition that wherever a proprietor consents to allow an artificial watercourse to pass through his property for the purposes of machinery below, it is necessarily implied that he consents that all the lower proprietors and occupants, with their servants, are to have constant access along the banks of the aqueduct for the purpose of seeing that it is properly kept. If this were well founded, there would be an unlimited right of common passage along the banks of every stream employed to turn machinery; for all proprietors have a right to prevent any obstructions in the stream, and to have them removed. But it never was pretended that, because of such right, they could at pleasure enter their neighbour's grounds to see that no such obstructions existed. This must always be a matter of arrangement.

If the privilege, however, be taken as matter of implication, it was due to the appellant to make reasonable provisions against the abuse of such right. Had the parties themselves arranged this matter, they would have provided, as far as possible, against the chance of such abuse. But the judgment under appeal, while it has introduced an unlimited right in favour, not only of all the original contracting parties, but their tenants and servants, has provided no remedy against the abuses which may arise from the practical assertion of this right.

*Respondents.*—On the supposition that the Sheriff was competent to entertain the appellant's petition, there can be no doubt that he was entitled to entertain the respondents defence, and therefore that the interlocutor is competent. In the Sheriff Court they objected to his jurisdiction, in so far as the complaint libelled on a contract relating to heritage; and because the complaint was not rested on possession under the agreement. Both the narrative, and the prayer of the complaint, raised a question of right, if it raised any question at all under the agreement. It contained no petitory conclusion or prayer, properly speaking; and therefore the respondents maintained, both in the Sheriff Court and in the Court of Session, that the complaint as laid should have been dismissed by the Sheriff for want of jurisdiction.\* They still maintain that plea, but as the Court below have decided in their favour on the merits, they have no interest to insist in it. Supposing therefore that the action is not to be dismissed, the respondents must be entitled to show that the construction attempted to be put on the contract is not well founded, and consequently that the judgment sustaining their plea is not incompetent.

By the nature and provisions of the contract, an interest in, or servitude over, the property of the dam-dyke and lead was conferred on all the contracting parties. Each was empowered to erect such a number

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\* Erskine, b. i. tit. 4. sec. 2., and b. iv. tit. 1. sec. 46; Magistrates of Stirling v. Sheriff, Nov. 1752, Mor. 5784; Rose v. the Magistrates of Tain, 7th July 1827, 5 S. & D. 911, new ed. 846; Wight v. Wilson, 27th Nov. 1827, 6 S. & D. 132; Thomson v. Donald, 4th March 1830, 8 S. & D. 630.

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of mills on the sides of the canal, within his own property, as he might think proper; and though the dam-dyke was to be erected by Reid at his own expense, the burden of maintaining and repairing it was laid upon all the three parties equally. As the interest in the dam-head was to be common to them all, so the obligation of keeping it in repair was imposed upon “the said three parties equally, in all time coming.” As there was no special provision whereby any one of the parties was to have the regulation of the sluice and supply of water, the right and interest to do so was common to all the parties, — regard being always had, in the use of the stream which they required, to the rights of the other parties interested. Indeed, wherever a right of servitude over the property of another is expressly conferred, or a common right and interest created over their several properties by contracting parties, there is implied a right in each to enter the lands of the others, for all the necessary purposes of obtaining a due exercise of the right of servitude or interest so conferred in the property of the others.\*

There is no precise form of words necessary to establish a right of servitude over property. The burden may be imposed either by express or presumed agreement of parties; and as there are as many varieties of conventional servitude, as there are ways by which property can be burdened, or the exercise of it restrained in favour of another, so the forms of constituting servitudes are also various.† Besides, the establishment of a

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\* *Middleton v. the Town of Old Aberdeen*, 14th Feb. 1765, Supplement to *Mor.*, vol. v. p. 904.

† *Erskine*, b. ii. tit. 9. sec. 2; *Garden v. Aboyne*, 27th Nov. 1734, *Mor.* 14517.

right of servitude not only implies the means to make it available to the proprietor of the dominant tenement on all ordinary occasions, but it would appear, if there be no stipulated restraint, that he may extend the servitude even beyond the former usage.\*

The respondents, however, ask no extension of the burden laid by the agreement of 1801 upon the appellant's property, or restriction of the burden thereby laid on their property. All they ask is, that he shall permit that to be done, which, from the very nature and terms of the agreement of 1801, it is manifest he was bound to permit.

LORD CHANCELLOR. — My Lords, I feel it impossible to take the same view of this question which their Lordships in the Court below ultimately took, and upon which alone their decision was pronounced. This case originated in a petition to the sheriff depute of Stirlingshire, by Weir, the appellant, upon an allegation by him of certain things having been done by the respondents in derogation of his rights of property, and which were not justified (as he set forth) by an agreement, under which he conceived that their right to these things was asserted, and attempted to be exercised. An answer was put in by the respondents, in which, without denying the repeated acts alleged by the appellant, they denied an act alleged to have taken place on the 28th of February, and gave an explanation, and in some sort asserted a right, but not that right which the Court has

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\* Erskine, b. ii. tit. 9. sec. 4 ; Lord Elchie's Reports, 4th and 11th Dec. 1771, title, Servitude, No. 2.



No. 13. ultimately found, and which the Lord Ordinary denied to be in the respondents. If the matter had rested there, I should have had no hesitation in stating that there was no sufficient denial of the general allegation, whereupon to entitle the Court to say, that all which had been alleged on the part of the appellant in support of his application for an interdict had been denied. But, subsequently, condescendences and answers were given in on each side, and a more specific allegation having been made by the appellant in the sixth article of his condescendence, of the facts necessary to support his application, a very specific denial appears to me to have been given by the respondents. The sixth article embodied all that was stated in the petition, namely, both the generality of the trespasses alleged, and the particular trespass on the 28th of February. We must therefore take it, that before the sheriff came to pronounce his judgment, he had an allegation on one hand substantially denied on the other, and a proof was allowed by the sheriff of the sixth article, and the answer to that article. I have looked very narrowly into that proof, and I am not prepared to say—but for the sake of examining it a little more fully, I shall beg permission of your Lordships to take time—I am not prepared to say that there is evidence which ought to have satisfied the sheriff that there was that done, or that threatened to be done, on the part of the respondents or their servants, which would have entitled the appellant to the interdict. In order to ground an application for an interdict in Scotland, as for an injunction in England, the party applying for that extraordinary and summary interposition must satisfy the Court that he not only has a *prima facie* right on which he proceeds, but that a wrong has

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been done or threatened to be done by the party against whom he applies. If, therefore, the appellant has not set forth and has not proved that which was sufficient to satisfy the Court either of a wrong done, or of a threat used to do a wrong, inconsistent with his admitted or proved rights, then he had no right to the interdict, and the sheriff justly refused it. It would follow by the same reasoning that the Lord Ordinary was wrong in granting the interdict, and that as far as the Court of Session reversed the finding of the Lord Ordinary granting the interdict, so far the Court of Session was right, and to that extent, at least, the judgment must be affirmed. I am now assuming that I shall, on further consideration of the evidence, continue to be of the opinion with which I am impressed at present, that there is not sufficient brought to the knowledge of the Court to satisfy them that the appellant has entitled himself to interposition, by proving either wrong done or wrong threatened. But all that I have at present stated has unhappily not been that which has occupied the attention of the Court below, for we find their whole consideration has been applied to a perfectly different point. They have proceeded to discuss the question alone, whether—supposing that the appellant had shown something to have been done, or threatened to be done—whether that something was inconsistent with his rights; and this raised the question, (to which alone the Court has applied itself, and upon which alone any explicit judgment has been pronounced)—did the agreement under which the parties professed to act justify them in that supposed act? The Court assume that the respondents have acted—have used the threat—have actually entered upon the appellant's premises for the purpose of going

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to the sluice, and examining in what state the works were, and then they inquire (supposing them to have done so), had they a right so to do? and this was the only matter decided by the Court of Session. The conclusion to which they come upon the consideration of the agreement is, that the interlocutors of the Sheriff and the Lord Ordinary should be recalled in toto. The opinion of the Court upon the agreement, and the rights consequent upon the agreement, so nearly resembled, I may say, so entirely coincided with the bulk of the opinion of the sheriff, that I do not exactly understand upon what specific difference of opinion the recall of his interlocutor rests. But, at all events, they most justly, and consistently with their view of the case, recall the interlocutor of the Lord Ordinary, because they differ with him on the rights of the parties, and then proceed to “ find, first, that in consequence of the foresaid “ agreement, the respective parties concerned, or persons properly authorized by them, have a right to pass “ along the bank of the cut or canal to examine the “ same, and see that it is kept in proper repair by all “ concerned, and that the stipulated quantity of water “ is supplied to the parties interested, and so as either to “ prevent apparent injury ——” [by “ apparent injury” must, I presume, be meant apprehended injury—for if by apparent injury is meant, as it critically and properly means, injury which already exists (if it does not exist it cannot appear)—it is utterly inconsistent with the word *prevent*; you cannot prevent that which does exist.] Then we pass on, “ or to remedy such when it “ does happen as speedily as possible, but for no other “ end or purpose.” Then comes the second finding, (which is only a general finding of what the law would

have done in favour of the one party and in restraint of the other, without any such finding at all,) “ That such “ right of passing along the banks of the cut or canal, “ for the purposes above mentioned, is not to be exercised unnecessarily or nimiously; and if any such im- “ proper exercise should be attempted, reserve to all “ concerned right to complain to the Judge Ordinary “ thereupon.” It is perfectly clear that the construction put upon this agreement is, that it gives each of these three proprietors a mutual right over their respective estates. If, therefore, the one enters on the estate of the other, that entry cannot be called a trespass; for if it is a right it is not a trespass, but a mutual right of way, and it is one which is given without restriction in point of space or in point of time, when exercised for the purpose of examining what is done or doing, or omitted to be done, with the works—in which works all three are said to have a common interest under the agreement. Now, is that the sound construction of the agreement, or is that the sound meaning of the consequences to follow from the agreement on behalf of one, as against the other of the proprietors? I have looked in vain through this agreement for any such right. The parties agree to make on the different parts of their properties the different parts of this canal, and Mr. Reid is to make the dam head at his own proper cost—each of the others (and Mr. Reid himself also) is to make, at their several charges, the canal from that dam-head downward. The repair of that dam-head is to be borne, as regards the expense of it, by the whole three of the proprietors in equal shares. The agreement is silent—that is, there is no express agreement specifying which of the three parties it is that shall, in the first instance, make the repair.

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of the dam-head—it being only specified in what way he, whoever it is, who does it, or they, whoever they are, who shall do it, shall recover their expenses; for the only specification touching the repair is this,—“and the expense of maintaining and repairing the said dam-dike shall be defrayed by the said three parties equally, in all time coming.” Then there is a clause of relief in behalf of Mr. Morehead, as against Mr. Reid, namely, that Mr. Reid, for ten shillings a-year, is to bear Mr. Morehead’s share of those expenses, but that is coupled with another provision, not making it optional to Mr. Morehead, if he pleases, for ten shillings a-year, to throw his share of the expenses upon Mr. Reid, but positively binding Mr. Morehead, at all events, to pay ten shillings a-year, which shall cover his share of the expense; and Mr. Reid, for that ten shillings a-year, is to pay Mr. Morehead’s share of the expense. Nothing is said of Mr. Napier and his share, but he is a party executing this instrument, as well as Mr. Reid and Mr. Morehead, and consequently, as binding also his estate, he must be taken to be cognizant of this part of the agreement as well as of all the rest. Now, the first question which arises upon this is, in strictness of construction, Upon whom shall we say is thrown, in the first instance, the repairing the dam-head? No one is specified, nor is it said which of the three shall do it; it is only said that the expense shall be equally borne; but take these two matters into consideration, and, I think, your Lordships will at once come to the conclusion that it must devolve upon Mr. Reid. In the first place, Mr. Reid’s is the ground on which the dam-dike is; that of itself would furnish a strong presumption, in the silence of the instrument, that he, in the first instance,

was to be assumed to be the person to do the repair; and that would convert the clause, dividing the expense equally among the three, into a clause providing for his reimbursing himself for those repairs which he should make. The second circumstance is, that it is expressly provided that Mr. Reid shall construct, at his own proper cost, the dam-dike originally; while he, like the other two, as I understand, is to make the canal as far as the cut passes through his ground; but he is, over and above that, at his own proper costs and charges, (as I read the instrument,) to construct the dam-dike. Then, is it not natural to conclude, that the repairs are meant to be done, in the first instance, by the party on whose ground it is, and who burdened himself with the original construction of the dam-dike, but that he shall recover a proportion of those expenses from the co-proprietors? I am of opinion that that is the sound construction of the instrument, and must be taken to be its meaning, though it is not expressed. Now, if this be so, I apprehend there is an end of the only argument for supporting the construction put upon this instrument in the Court below, as giving a mutual right of way to each of those parties over the tenements of the other parties. I can see no ground for supporting that conclusion, if you once believe that it was not all the three, but Mr. Reid alone, and those who might have his estate, who were to perform the repairs of the dam-head, recovering the expense from the co-proprietors. I am therefore of opinion, upon the construction of the instrument itself, that a wrong conclusion has been arrived at. But I think that there are other reasons which will readily occur to support the same conclusion, and to authorize me in the dissent which I have to the pro-

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position. Can it be supposed that, without any evidence of a right so large, almost so unlimited, as that assigned, you are rashly to say that either of these parties is to have this very extraordinary privilege of going at all times, without asking consent, over the property of his neighbour, whether at a season convenient or inconvenient for that neighbour, for the purpose of what is called, generally, examining the state of the works? When persons do grant such a right, it is usual to grant it on stipulations that restrain the exercise of the right. Is it meant to be said that those three proprietors have bound themselves, and those who might afterwards have their estates, either by purchase or otherwise, from using their property in the way in which such property is generally used? How can that be contended? Suppose that there is a neck of land, or narrow space, separating the dam-head from the lower space, is it to be said that, in order to preserve the right of way to the inferior proprietors, the owner must never use that neck of land as he pleases? — that he cannot build upon it without permission of his neighbours, because there is a right of way through in order to get to the dam-dike? — that he cannot convert it into a bleaching-ground, without leaving a space through which the party can pass to the dam-dike? Can such an extraordinary restraint on property be rashly and easily assumed, when there is nothing said whatever, further than the general stipulations and obligations of which this instrument consists? I should require certainly something a great deal more express to justify the conclusion to which the Court have come. Though we have the judgment of the learned Judges, we are in some measure without the reasonings on which their

judgment was ultimately founded. We are furnished with a very accurate note of what some of the Judges said, and a less accurate, I have no doubt, as to others; but I find, and it is remarkable, that the judgment is supported only by one of those learned Judges; and this very greatly diminishes the reluctance I should otherwise have felt in pronouncing a judgment different from that of their Lordships. Lord Craigie came to a conclusion similar to that which the Lord Ordinary had adopted, and formed the same opinion upon this instrument, and on the rights of the parties under it. Lord Balgray is the only one of the four learned Judges whose argument supports the construction of the instrument adopted in the final judgment, and consequently the only one of the learned Judges whose argument points at the finding to which I have called the attention of your Lordships; the other four learned Judges give no support, by their reasonings, either to that construction, or to that judgment. My Lord President only says, that he concurs in the opinion of Lord Balgray, but his reasons do not coincide with those of that learned Lord. He says, "If the water fails to come down  
 " to Glenny's mill, has he not a right to go and see  
 " why it is stopped? The canal was made for the pur-  
 " pose of affording a regular supply to the whole mills.  
 " At the same time it is clear, that any nimious or ex-  
 " cessive use of this right of passage would be restrained  
 " by the law, but it would have been equally so re-  
 " strained if the right of passage had been expressly  
 " stipulated in the original agreement, instead of ac-  
 " tually arising out of it as being necessary to the ex-  
 " plication of the contract of parties. For the same  
 " reason that Glenny has a right of passage upwards,

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“ Weir must have a right of passage downwards, in the event of any obstruction to the water-course occurring in the grounds occupied by Glenny, so as to make the water regorge on Weir’s lands, or otherwise to affect his use of the canal.” That is all the Lord President’s argument; but that is not the argument on which the judgment is founded which supports that construction of the agreement — that is not a reason in support of the rights declared in the interlocutor to exist under that agreement; it supports a construction of a different kind — it leads to a finding different from the one pronounced — it leads to the finding, that under the agreement the parties had a right to go upon each other’s lands, when and as often as actual obstruction existed — when and as often as actual injury was done, for the purpose of remedying it; but that is not the judgment; the judgment is, that before any injury is committed, before any obstruction is made, a party is entitled to go upon his neighbour’s land, without restraint, for the purpose of examining and preventing an injury which there is reason to apprehend. Now, what I have said with respect to the Lord President’s reasons, applies in a great degree, though not entirely, to those of Lord Gillies. He gives no reason in support of the judgment, or the construction upon which that judgment proceeds, though he does (but not so very explicitly as the Lord President) give reasons in support of another construction, leading to another judgment. It rests then entirely on Lord Balgray’s reasons; and those are, as they are given in this paper, that the parties have a right to mutual ways over each other’s premises, without any very great regard to the occasion for which they were to use them, but for every purpose connected

with these works, the dam-dike and the sluice; that they had mutual rights, I will not say of trespass, (for if it is right it is not trespass,) but a right of going in all directions, at all times, over each other's premises, for the purpose—indeed it does not say for any purpose—to see that both the dam-dike and the canal are kept in sufficient repair. His Lordship says, “to see that both “ the dam-dike and the canal are kept in sufficient “ repair, and that there is a due supply of water.” And then his Lordship is represented to have added, that, in order to prevent such a right of going on each other's grounds, it would have been necessary that the express reservation of an exclusive right of property and express protection from trespass should have been made in terms—in short, it is represented thus: that if three persons have premises contiguous to each other, and if they happen to have a canal going through, then it follows, by the operation of this law, that they shall have an opportunity of going through each other's premises, in order to look at the canal which runs through each close, unless each shall, by express reservation, protect his close from the trespass of both his neighbours. That is the principle laid down; and it appears to me to be a perfectly novel view of the rights of property. It by no means follows, that from an agreement to make a canal through three closes, that a right of way, for the purpose of looking at the works, exists, without an express provision under the agreement between the parties. I am therefore very decidedly of opinion, that this interlocutor cannot stand as it is now framed. The question is, whether it can stand at all, as respects the fundamental matter of the appeal. I shall afterwards read the evidence, with a view to see whether I can discover any

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thing to show that the appellant, though he may be quite right as regards the interlocutor of the Court of Session, in the respects to which I am referring, is not wrong in the basis of his claim to have an interdict here: that is a very material part of the case; for that is the subject-matter and origin of the present appeal. If I shall be of opinion that the interlocutor is wrong, it must be reversed as it now stands; and though the Lord Ordinary's interlocutor, as far as it differs from that finding, is right, yet if it be wrong in granting the interdict, and the sheriff be right in refusing it, then the interlocutor of the Court of Session was right in recalling it.

Adjourned.

LORD CHANCELLOR. — My Lords, I formerly stated to your Lordships the views I entertained of the question in this case, and the grounds upon which I find it impossible to arrive at the same result as the learned Judges in the Court below. I stated, that it appeared to me that there were two questions, one of which was, what was the right of the parties under the agreement? and the other was, whether any thing had been alleged in the petition, by the party applying for the interdict, to have been done, or if not done, had been threatened to be done, and proved to be so, which amounted to a wrong, upon a sound construction of the agreement. I am far from intending again to take your Lordships through the whole of the opinion I then gave; suffice it to say, that a further consideration of the case has confirmed entirely the view which I then held of the rights of the parties under the agreement; and it has also confirmed the opinion which I then held, that the facts did

not entitle the appellant to an interdict to restrain the respondents going upon the land. There is nothing alleged, either formally or in substance, much less proved, to justify the sheriff in granting that interdict; notwithstanding my opinion remains as it was originally as to the right he would have had, and the obligation the sheriff would have been under to grant the interdict, if he had shown wrong, so as to justify the sheriff in so doing. The only question upon my mind relates to the costs; but upon the whole, and considering all the facts of the case, I do not think it fit that the respondents should be allowed the costs, and therefore I shall satisfy myself with recommending to your Lordships that the appellant, at all events, should not be allowed his costs. The result will be, that the opinion which I before strongly entertained and expressed, in which the learned Chief Justice, whose assistance we had in the consideration of this case, entirely concurred, that the construction of the agreement, and the rights of the parties being now ascertained, there will be no necessity for any further application for an interdict; or at all events, if any wrong should be done, or any menace of wrong, the sheriff will, as a matter of course, considering the construction now put upon the instrument and the rights of the parties under that instrument, hold that, in every case of going upon the ground, the party is entitled to an interdict, unless where there has been actual damage by breaking down the dam-head, or allowing it to go into disrepair; but there cannot be actual damnification stated to justify the party in going upon the ground, and they are not justified in going in the way that it is contended that they have a right to go, merely for the

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No. 13.      sake of seeing whether it is likely that damage will  
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The House of Lords ordered and adjudged, That the interlocutor complained of in the said appeal be and the same is hereby reversed : And the Lords find it not proved that the occupiers of the lower mills had possessed a road or access to the dam-head, or been in use to regulate the sluice there for seven years previous to the commencement of this action, and that on the contrary it is proved that any possession by them does not reach back for nearly so long a period : The Lords also find, that as the respondents have no express grant of servitude or decree of declarator to this effect, and as they have had no possession sufficient to entitle them to a possessory judgment, the appellant, as proprietor of the ground, has right to prevent them or their servants from using the road in dispute, except in the case of obstruction in the water of the mill-head in question, or of actual damage arising to their works : But in respect it is not proved that the respondents or their servants had done or threatened to do any thing inconsistent with the rights of the appellant, the Lords find, that the appellant was not entitled to such interdict, and therefore refuse the same, but grant the interdict craved as to the use of the road to Tamaree Mill, acquired by the appellant's predecessor by feu contract from the late Archibald Napier, the respondents making no claim thereto ; and the Lords find no expenses due to either party in any part of the proceedings : And it is further ordered, that, with the above findings, the cause be remitted back to the Court of Session in Scotland, to proceed therein as shall be just and consistent with this judgment.

ALEXANDER DOBIE,—THOMAS DEANS, Solicitors.

[8th April 1834.]

ROBERT ALLAN and SON, Appellants.—*Rutherford*. No. 14.ALEXANDER TURNBULL for the Edinburgh and Leith Glass Company, Respondent.—*Attorney General (Campbell)*.

*Partnership — Assignment — Right in Security.*—A partner of a joint stock company assigned to bankers certain shares of the company ex facie absolutely, and they intimated the assignation to the company: Held, in a question with the company, (affirming the judgment of the Court of Session,) that the bankers, as assignees, were liable as partners; and that it was not relevant to free them from this liability to allege that the assignation was granted in security of payment of debt, and that certain forms prescribed by the contract of partnership as to transferring shares had not been observed.

MR. JAMES STUART of Dunearn held 150 shares of the capital stock of the company called the Edinburgh and Leith Glass Company, formed in 1824, and on which, prior to April 1828, he had paid three instalments, under calls made by the Directors. On the 12th of that month he executed, in favour of the appellants, Robert Allan and Son, bankers in Edinburgh, an ex facie absolute assignation of 100 of his shares, in these terms:—“ I, James Stuart, Esq., of Dunearn, “ hereby assign, transfer, and make over to and in “ favour of Thomas Allan, Esq., of Lauriston, and

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Lord Medwyn.

No. 14. “ Alexander Wight, Esq., bankers in Edinburgh, indi-  
 8th April “ vidual partners of the company carrying on business  
 1834. “ under the firm of Robert Allan and Son, bankers in  
 ALLAN & SON “ Edinburgh, and to the survivor of them, and the  
 v. “ heirs of such survivor, in trust for behoof of them-  
 TURNBULL. “ selves and such other person or persons as may be  
 “ for the time sole partner or the partners of the said  
 “ company or firm of Robert Allan and Son (under  
 “ whatever name, title, or firm they may be for the  
 “ time known), and to the assignees or disponees of the  
 “ said trustees or survivor of them, 2,000*l.* of the capital  
 “ stock of the Edinburgh and Leith Glass Company,  
 “ which belong to me, and are entered in my name in  
 “ the books of the said Edinburgh and Leith Glass  
 “ Company, with the whole profits and dividends that  
 “ now are or may hereafter become due upon the said  
 “ capital stock of the said company; with full power  
 “ to the said trustees, or survivor of them, or their or  
 “ his foresaids, to procure the same transferred to their  
 “ or his own names or name in the books of the said  
 “ company; and also to uplift, discharge, and convey  
 “ the same, and the profits and dividends arising  
 “ therefrom, in the same manner as I might have done  
 “ before granting hereof, or as the other proprietors  
 “ of the said company are entitled to do by their contract  
 “ of copartnery; and I oblige myself to warrant this  
 “ assignation from all facts and deeds done or to be  
 “ done by me in prejudice hereof. In witness whereof,”  
 &c.

This assignation was qualified by a back bond granted to Mr. Stuart, whereby it was declared, by Allan and Son, to have been made in security of the debts owing by Mr. Stuart to them, and they became

bound to redispone the shares; "but that only in case  
 " the whole" of the debts, &c., " are paid by the said  
 " James Stuart or his foresaids to the said Robert  
 " Allan and Son, at or preceding the term of Martin-  
 " mas next," declaring, that if not so paid, " the full  
 " and absolute right of property" of the shares should  
 remain with Allan and Son, who should then be en-  
 titled to sell by public roup, but under an obligation  
 to account to Mr. Stuart for the proceeds.

By the deed of copartnery it was provided, inter  
 alia :—" 9. That the partners shall be at liberty to sell  
 " and dispose of the whole or any number of the  
 " shares held by them, and that either gratuitously or  
 " for any onerous consideration, inter vivos or mortis  
 " causa. But declaring always, that in case of sale or  
 " conveyance inter vivos, for an onerous consideration,  
 " an offer of the share or shares shall be first made in  
 " writing to the ordinary directors for behoof of the  
 " company; which offer the ordinary directors shall  
 " have full power to accept in manner after mentioned,  
 " and three lawful days shall be allowed them to con-  
 " sider of the same; and if such offer shall be declined  
 " or not accepted of by the ordinary directors within  
 " the said period of three days, then and after the  
 " lapse thereof the partner making the offer shall be  
 " entitled to make a sale or sales of such shares to  
 " any person or persons he thinks proper, at or above  
 " the price demanded for the same from the company,  
 " but he shall not be entitled to make such sale to  
 " any person at a lower price, until a new written  
 " offer at such lower price shall first have been made  
 " to the ordinary directors, and declined or not ac-

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“ cepted of by them, in the same manner as was  
 “ necessary with regard to the first offer.

“ 12. That where the share or shares of any partner  
 “ are transferred, conveyed, or sold in terms of the  
 “ above articles, and that either by the partners or  
 “ ordinary directors, the assignation thereof shall be in  
 “ the following terms:—

“ ‘ I, A.B., in consideration of paid  
 “ ‘ to me by C.D., do hereby sell, assign, convey,  
 “ ‘ transfer, and make over to and in favour of the  
 “ ‘ said C.D. the sum of capital stock  
 “ ‘ of and in the Edinburgh and Leith Glass Com-  
 “ ‘ pany, being one share (or so many shares, as the  
 “ ‘ case may be, numbers ) in the said  
 “ ‘ undertaking, to be held by the said C.D., his execu-  
 “ ‘ tors, administrators, and assignees, subject to the  
 “ ‘ rules, orders, and restrictions that I held the same  
 “ ‘ under immediately before the execution thereof;  
 “ ‘ and I, the said C.D., do hereby agree to take and  
 “ ‘ accept the said capital stock, subject to the same  
 “ ‘ rules, orders, restrictions, and conditions. In wit-  
 “ ‘ ness whereof we have subscribed these presents.  
 “ ‘ Written by at the  
 “ ‘ day of before these witnesses.’

“ And on every such sale the said deed of convey-  
 “ ance, being executed by the seller or sellers, and the  
 “ purchaser or purchasers of such share or shares, shall  
 “ be kept by the purchaser or purchasers for his, her,  
 “ or their security, after the officer of the company  
 “ appointed by the directors for that purpose shall have  
 “ entered, in a proper book or books to be kept for that  
 “ purpose, a copy or memorial or specification of such sale

“ or transfer, and have testified the entry of such copy  
 “ or memorial on the said deed of conveyance, for  
 “ which a fee of 2s. 6d. per share on the amount of  
 “ stock transferred, or such other commission as the  
 “ ordinary directors may fix, shall be paid by the pur-  
 “ chaser or assignee, to be applied for the benefit of  
 “ the company as the ordinary directors may think  
 “ fit; and the officer so appointed is hereby required  
 “ to make such entry of such copy or memorial or  
 “ specification, and grant such certificate thereof, with-  
 “ out any undue delay.

“ 14. That the said ordinary directors shall and  
 “ they are hereby required to cause the names and  
 “ designations of the several persons who shall be  
 “ entitled to shares in the said undertaking, with the  
 “ number of the shares, and also the proper number  
 “ by which every share shall be distinguished, to be  
 “ fairly and distinctly entered in a book to be kept in  
 “ the company’s office for the purpose, and after such  
 “ entry to cause the same to be signed by the chairman,  
 “ deputy chairman, or any of the ordinary directors,  
 “ or such officer as they may empower and appoint to  
 “ do so; and shall also cause a certificate, signed by  
 “ one of the ordinary directors, or officer so autho-  
 “ rized, to be delivered to every proprietor, on  
 “ demand, specifying the share or shares to which  
 “ he, she, or they is or are entitled in the said under-  
 “ taking.

“ 15. That the bodies politic, corporate, and colle-  
 “ giate, and all and every person and persons whose  
 “ names shall at any time hereafter stand in the said  
 “ register book or list of proprietors of the said com-  
 “ pany, either as proprietor or proprietors of one or

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No. 14. “ more share or shares in the said undertaking,  
8th April “ whether as subscribers, or as successors, executors,  
1834. “ administrators, or assignees of subscribers, shall be  
ALLAN & SON “ deemed and taken to be the proprietors of the  
v. “ several shares standing in the said book in their  
TURNBULL. “ respective names, and shall be subject and liable to  
“ the payment of every call or calls made and to be  
“ made thereon, and to all actions, suits, forfeitures,  
“ and penalties to which original proprietors of shares  
“ in the said undertaking are made subject and liable  
“ by this contract; and that all notices hereby required  
“ to be given shall be given to the party appearing by  
“ the said register book of the said company to be  
“ such proprietor or proprietors, or their representa-  
“ tives, or left at his, her, or their last or most usual  
“ place of abode, and shall be in all respects good, suffi-  
“ cient, and conclusive; and all payments of interest and  
“ dividends due and to become due on such shares  
“ shall be made to such persons as by the said books  
“ of the said company shall so appear to be a proprie-  
“ tor or proprietors thereof; and that no assignment,  
“ transfer, conveyance, or sale of any share or shares,  
“ or other instrument giving title to any share or shares,  
“ which shall not have been enrolled or registered as  
“ directed by this contract, shall be admitted as evi-  
“ dence, either to defeat any action or suit brought  
“ or to be brought by the said company of proprietors  
“ to recover the said calls, or to entitle any person to  
“ recover any share or shares forfeited to the said  
“ company of proprietors, or to make the said com-  
“ pany of proprietors liable in the payment of divi-  
“ dends, or to found any other claim whatever against  
“ the said company, or to any other person than such

“ as appear from the said book to be proprietors of  
 “ the said shares; but that in all cases the said book  
 “ shall be considered as sufficient and conclusive evi-  
 “ dence of the proprietorship of the said shares, de-  
 “ claring that until each respective proprietor shall  
 “ have been enrolled as such for the space of at least  
 “ fourteen days he shall have no right to vote, or  
 “ attend at any meeting of the company of proprietors,  
 “ or otherwise interfere in the business thereof.”

On the 7th of August 1828, intimation was made by Allan and Son to the Glass company, under form of notarial instrument, of the assignation in their favour, of which a copy was furnished to the Company, but no communication was made to them as to the existence of the back bond. This intimation was inserted in the company's journal of transfers on the same day on which it was made, and the names of Robert Allan and Son were subsequently entered in the register of stockholders, but not until after the 20th of August, by which time Mr. Stuart had become bankrupt and left the country. None of the other requisites were complied with. Thereafter, certain additional calls were made by the directors, and Allan and Son were required to pay them. For some time they did not positively refuse, or deny their liability, though they avoided any acknowledgment to that effect, but the Glass company ultimately turning out unprosperous, they maintained that they were not partners, and were not subject to any responsibilities as such. The Glass company then raised an action before the Court of Session, concluding to have it declared, “ that the said Thomas Allan and  
 “ Alexander Wight, as trustees foresaid, and the said  
 “ firm or company of Robert Allan and Son, and the

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No. 14. “ said Thomas Allan and Alexander Wight, the indi-  
 8th April “ vidual partners thereof, are partners of and in the said  
 1834. “ Edinburgh and Leith Glass Company, and holders  
 ALLAN & SON “ of the foresaid 100 shares of the capital stock thereof,  
 v. “ and as such liable for all calls made or to be made  
 TURNBULL. “ by the ordinary directors under and in terms of the  
 “ said contract of copartnery;” and that they should  
 be decerned to make payment of the amount of the  
 several calls on these shares remaining unpaid.

Allan and Son pleaded in defence that no effectual transfer had, in terms of the rules of the Company, been made in their favour, and at all events, as it was clearly established that the assignation was granted, not as an absolute transfer, but merely as a right in security, and as they were willing to renounce all right to the shares, they could not be made responsible as partners.

The Lord Ordinary, on the 16th of February 1831, decerned in terms of the libel, but found no expenses due, and referred to the case of the East Lothian Bank v. Turnbull, 3d June 1824.\* Allan and Son having reclaimed, the Court appointed a hearing in presence by one counsel on each side, and the back bond having not hitherto been produced, they granted diligence for recovery of it. After hearing counsel they ordered the question to be argued in Cases, and thereafter appointed them, with the record, to be laid before the other Judges, and requested their opinions “ as to “ whether the Lord Ordinary’s interlocutor ought to “ be adhered to, or not; and, if not, what alteration “ ought to be made thereon.” The following opinions were thereupon returned:—

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\* 3 S. & D., 95. (new ed. 63.)

*Lords President, Craigie, Gillies, and Balgray.* —

“ We are of opinion that the Lord Ordinary’s interlocutor in this case ought to be adhered to, without any alteration.

“ All the clauses in the contract of copartnership founded on by the defenders, either do not apply to this case, or are clauses solely in favour of the company ; which, if the company does not think it necessary to enforce, no other person is entitled to found on.”

*Lords Medwyn, Corehouse, and Fullerton.* — “ The shares of the stockholders in the Edinburgh and Leith Glass House Company were assignable, both at common law, and by the express provision of the contract of copartnership. On the 12th of April 1828 Mr. Stuart granted a disposition and assignation, *ex facie absolute*, of 100 shares of his stock in that company to Allan and Son, the defenders. The assignation was completed by an intimation to the manager on the 7th of August following, and of the same date it was entered in the journal of transfers, kept in terms of the 12th article of the contract. The question has arisen, whether the defenders by that conveyance became shareholders of the company, and as such liable to all the obligations of partners? The Lord Ordinary has decided in the affirmative, and we are of opinion that his interlocutor ought to be adhered to.

“ Messrs. Allan and Son rest their defence on two grounds. They plead, first, that the transfer in reality was not absolute, but granted in security of a sum which they had lent to Mr. Stuart; and, secondly, that in consequence of the nonobservance

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No. 14. “ of certain provisions in the contract relative to the  
 “ transfer of shares, the assignation, considered as an  
 8th April “ absolute conveyance, was inoperative.  
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“ 1. With regard to the first plea it may be ob-  
 “ served, that the assignation did not bear, either ex-  
 “ pressly or by implication, that it was granted in  
 “ security. On the contrary, it imported an absolute  
 “ transfer of all right that was in the cedent to the  
 “ shares in question. It is true that the conveyance  
 “ was qualified by a back bond, by which the defenders  
 “ consented to re-dispone to Mr. Stuart, if he repaid  
 “ the debt at or before Martinmas 1828. But that  
 “ obligation was not communicated to the company  
 “ for a period of many months after the assigna-  
 “ tion had been intimated,—after the bankruptcy of  
 “ Mr. Stuart,—after repeated calls had been made on  
 “ the defenders for payment of their instalments as  
 “ partners,—and after it appeared, even by the terms  
 “ of the back bond itself, that the term of redemption  
 “ had expired. We are of opinion, therefore, that  
 “ this latent obligation can have no effect whatever  
 “ upon the question at issue.

“ 2. There are provisions in the contract, that a  
 “ partner desiring to sell all or any of his shares shall  
 “ previously make an offer of them to the company,  
 “ which may be accepted of within three days; that  
 “ the assignation, when granted, shall contain an obliga-  
 “ tion, subscribed by the assignee, to hold the shares  
 “ under the conditions and subject to the rules of the  
 “ company, and that the transfer shall be recorded in  
 “ the register of stockholders,—regulations which, it is  
 “ admitted, were not complied with in this instance.  
 “ But the company having received intimation of the

“ conveyance, and entered it in the Journal of Transfers,  
 “ without stating any objection, either at the time or  
 “ afterwards, must be held to have virtually waived the  
 “ right of pre-emption which might otherwise have  
 “ been competent to them. In the next place, though  
 “ they were entitled, if they thought fit, to require the  
 “ assignees to subscribe an express obligation to conform  
 “ to the rules of the company, and fulfil the duties of  
 “ partners, they were at liberty, if they chose, to dis-  
 “ pense with that form, and to rely on the common  
 “ law obligation, which the defenders undertook, by  
 “ accepting of and intimating a conveyance to the  
 “ shares. Lastly, as the company had obtained an  
 “ effectual warrant from both parties interested, to enter  
 “ the transfer in their register book, and as they had  
 “ entered it in their Journal of Transfers, we think they  
 “ were entitled to make the first-mentioned entry  
 “ *quandocunque*, even though the bankruptcy of  
 “ Mr. Stuart had intervened.”

“ The decision in the case of the East Lothian Bank  
 “ against Turnbull, cited by the pursuer, appears to us  
 “ a precedent, *à fortiori*, in the present question. In  
 “ that case it was provided in the contract, that every  
 “ transfer should be made and accepted in presence of  
 “ two directors, who should subscribe the deed of  
 “ acceptance. But the East Lothian Bank, after the  
 “ transfer had been intimated to them, so far from  
 “ waiving that provision, gave notice to the purchaser  
 “ that it was incumbent upon him to attend at the bank,  
 “ that the ceremony might be performed. Yet the  
 “ Court, notwithstanding, held that by the intimated  
 “ assignation the transfer had been completed,—that  
 “ Turnbull was a partner,—and that the regulation

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No.14. “ above mentioned being made for the benefit of the  
 8th April “ company, they were entitled to dispense with it if  
 1834. “ they saw fit to do so. We do not think that the  
 ALLAN & SON “ comment of the defenders on this case is well founded.  
 v. “ The circumstance that Turnbull might have been  
 TURNBULL. “ liable in damages to Wetherley for not implementing  
 “ his bargain, as in a question between these two parties,  
 “ did not infer, as in a question between Turnbull and  
 “ the bank, that he had become a partner, if any form  
 “ essential to the conveyance had been omitted.  
 “ Accordingly, the Court did not put their interlocutor  
 “ on the ground stated by the defenders; but, on the  
 “ contrary, upon another and different ground, namely  
 “ that nothing was essential to the completion of the  
 “ transfer but an intimated assignation, and that the  
 “ bank had power to dispense with the form of accep-  
 “ tance which the contract prescribed.  
 “ If these views be correct it is quite immaterial  
 “ that, as in a question between the defenders and  
 “ Stuart, the right to the shares was redeemable. It is  
 “ admitted in the record, that the defenders did not  
 “ communicate that condition of the agreement to the  
 “ pursuers at the date of the intimation; and it is not  
 “ averred that the pursuers were in the knowledge of  
 “ the fact. But although they had known it they were  
 “ bound to receive the defenders as partners, and to  
 “ enter them as such in the register; for there is no  
 “ rule of law, or provision in the articles of the co-  
 “ partnery, that a person holding a share subject to a  
 “ right of redemption shall not be a partner while it  
 “ remains unredeemed. It is equally immaterial, that  
 “ the pursuers had the privilege of refusing to acknow-  
 “ ledge the defenders as partners till the form of

“ registration was gone through, that being a personal  
 “ privilege of which they alone were entitled to avail  
 “ themselves. There is no anomaly in the result, for it  
 “ is of daily occurrence, that an individual shall be held  
 “ as a partner of a company, and subject to its respon-  
 “ sibilities in a question with one party, and the reverse  
 “ in a question with another party. The case of  
 “ Turnbull proceeds expressly on the ground, that the  
 “ East Lothian Bank had the option of taking the  
 “ cedent or the assignee as their partner, and might  
 “ have availed themselves of that option, exactly as it  
 “ suited their interest to do. Here, as in other cases  
 “ arising out of bankruptcy, there is undoubtedly an  
 “ appearance of hardship; but the pursuers, as well as  
 “ the defenders, are certantes de damno vitando, and all  
 “ property would be insecure if the general rules of  
 “ law were suffered to bend to considerations of that  
 “ nature.”

“ *Lord Moncreiff.*—This case appears to me to be  
 “ attended with very considerable difficulty; and at  
 “ present I am not satisfied that the interlocutor of the  
 “ Lord Ordinary is right.

“ The facts as they appear from the record are few  
 “ and simple. Allan and Son having in April 1828  
 “ advanced a large sum of money to Mr. Stuart,  
 “ obtained from him a deed of disposition and assigna-  
 “ tion of 2,000*l.* of the capital stock of the glass com-  
 “ pany, of which he was a partner to that nominal  
 “ extent. The deed was absolute in form, but qualified  
 “ by a back bond, which, as between these parties,  
 “ certainly rendered it, both in fact and law, an assigna-  
 “ tion in security only. It does not appear on the

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- No. 14. “ record of what date the back bond was executed,  
 8th April “ though it is stated in the case for the defenders that  
 1834. “ it was on the 4th August. But the assignation was  
 ALLAN & SON “ not intimated to the company till the 7th August;  
 v. “ and though it is not admitted in the record, it is not  
 TURNBULL. “ denied that the reality of the transaction was an  
 “ assignment in security only. Before the assignation  
 “ was intimated Mr. Stuart had left Britain.  
 “ The intimation of the assignment took no notice  
 “ of the back bond, or of the qualified nature of the  
 “ right, but it stated the terms of the assignation  
 “ itself. That deed bore an obligation to execute a  
 “ regular transference of the shares in terms of the 12th  
 “ article of the condensation. It was entered in a  
 “ book called the Journal of Transfers, of its date  
 “ the 7th of August; but no entry was made in the  
 “ register of stockholders, as provided by the 15th  
 “ article of the contract, till after Mr. Stuart’s bank-  
 “ ruptcy on the 20th August.  
 “ After the intimation, the pursuers made a demand  
 “ of two instalments of stock, amounting to 400*l.*,  
 “ against the defenders; and the record bears, that  
 “ ‘ they have failed to make payment of the same.’ It  
 “ does not appear from the record at what time these  
 “ calls were made, or when the back bond was first  
 “ made known to the pursuers; but all that took place  
 “ was posterior to the 7th August.  
 “ In this state of the facts, the question is whether  
 “ the pursuers are entitled to hold the defenders as  
 “ partners of the company, to the effect that, whether  
 “ they make any demand on their assignation other  
 “ than that expressed in the intimation and protest or

“ not, they must be liable to the calls made, in terms  
 “ of the contract, of the capital stock corresponding  
 “ to the shares previously held by Mr. Stuart.

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“ Unless there were a demand made for investigation  
 “ and evidence, I must hold it as a fact upon this  
 “ record, that, whatever may be the effect in regard  
 “ to the pursuers, the real transaction between  
 “ Mr. Stuart and the defenders was for an assignation  
 “ in security only, with a power of redemption. And  
 “ it is to be observed, that according to the terms of  
 “ the back bond the defenders were only to be entitled,  
 “ even after the term of redemption, to hold the shares  
 “ with a power to sell them by public roup, and to  
 “ account to Mr. Stuart for the proceeds. There was  
 “ no price fixed by the assignation; and the back bond  
 “ referred only to the debt in security of which it was  
 “ given.

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“ This being the nature of the transaction, it is clear  
 “ that if Mr. Stuart had continued solvent he could  
 “ never have compelled the defenders to become  
 “ partners of the glass company in his place; and that  
 “ the intimation of the assignment could not have had  
 “ the effect of entitling him to do so.

“ On the other hand, though the assignment was  
 “ absolute in form, and the intimation took no notice  
 “ of the back bond, it seems to be equally clear that  
 “ as no transfer was executed in terms of the contract  
 “ of copartnership, and for this reason, probably, the names  
 “ of the defenders were not entered in the register as  
 “ partners,—neither Mr. Stuart nor the defenders  
 “ could have compelled the pursuers to receive the  
 “ defenders as partners, discharging Mr. Stuart of all  
 “ responsibility, and extinguishing his rights as a

No. 14. “ partner. If, after such an intimation the defenders  
 8th April “ had become bankrupt instead of Mr. Stuart, it could  
 1834. “ not, in my apprehension, have been maintained by  
 ALLAN & SON “ Mr. Stuart, that the defenders had become the  
 v. “ partners, and that he had ceased to be under any  
 TURNBULL. “ obligation to the company. And supposing again,  
 “ that the company’s stock had been highly valuable,  
 “ certainly the creditors of the defenders could never  
 “ have drawn more than the debt in security of which  
 “ the assignation was given, or such part of it as might  
 “ not be satisfied from other sources.

“ It appears then,—1. That as between Mr. Stuart  
 “ and the defenders, the defenders were not partners;  
 “ 2. That as between Mr. Stuart and the pursuers  
 “ he was still the partner; and, 3. That as between  
 “ the pursuers and the defenders, the defenders were  
 “ not partners, if it had been for the interest of the  
 “ pursuers to maintain that they were not.

“ But I am of opinion that the transaction could not  
 “ possibly so stand that both Mr. Stuart and the  
 “ defenders should be partners of the company, upon  
 “ the same stock and at the same time. And neither  
 “ do I think it possible to hold, that the pursuers had  
 “ an option, according as it should suit their interest,  
 “ to take either Mr. Stuart or the defenders as their  
 “ partner. And yet, if I do not entirely misapprehend  
 “ the case, this last is the proposition which the pur-  
 “ suers must make out, in order to support their  
 “ claim.

“ The case of the East Lothian Bank against Turn-  
 “ bull, 3d June 1824, differs from the present case in  
 “ the fundamental fact, and must therefore depend on  
 “ different principles. In that case both the original

“ partner and the assignee were solvent ; and the Court  
 “ had held and decided, that as between them there  
 “ was a completed contract of sale for a price. Then  
 “ the question arose with the creditors, or rather the  
 “ other partners of the bank, (which was bankrupt as  
 “ a bank,) whether the assignee was liable to them  
 “ as a partner. The transfer had been executed in the  
 “ books of the company, in the form required by the  
 “ contract ; but the assignee had not signed an accept-  
 “ ance of it in presence of two directors, as the contract  
 “ provided. He had, however, distinctly acknowledged  
 “ it in writing, and pledged himself to appear and sign  
 “ the acceptance. The question, therefore, in that case  
 “ appears to me to have been, whether the bank were  
 “ not entitled to stand on the reality of the transaction  
 “ as between the cedent and the assignee, and the per-  
 “ sonal engagement for completing it, notwithstanding  
 “ that the particular provision for their own protection  
 “ had not been complied with. It was quite clear,  
 “ after the decision of the question between Wetherly  
 “ and Turnbull, that the assignee must at last bear the  
 “ loss ; and the Court simply held, that in that state of  
 “ the matter, as I should understand the case, he was  
 “ bound directly to the bank by his personal acts.

“ In the present case, if the pursuers were to stand  
 “ on the actual transaction, they must fail in their  
 “ demand, unless it could be maintained that the  
 “ holder of an assignment of a partner’s share in a  
 “ company, in security only, becomes actually a partner  
 “ of the company, by intimating the assignment. This  
 “ cannot be maintained ; and therefore they must rest  
 “ their case on very different ground from that on  
 “ which the East Lothian Bank stood in that case.

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“ They rest it on this, that the assignment was appa-  
 “ rently (though not really) absolute, and that the  
 “ back bond was not intimated.

“ If there were any facts in the case from which it  
 “ could be inferred that the pursuers were in any  
 “ respect misled or deceived by the absolute form of the  
 “ assignation, and that they suffered injury thereby, I  
 “ should think that they were clearly entitled to redress ;  
 “ but there is no such averment in the record ; and it  
 “ would be a case to be tried in a different manner.  
 “ I humbly think that the very form and substance of  
 “ the deed of assignation must have made them aware  
 “ of the nature of the transaction ; —made, as it was, in  
 “ April, when, from the calls then in cursu, the stock  
 “ was evidently at a discount,—made without any price  
 “ stipulated, unless the precise nominal value of the  
 “ stock were held to be the price,—no transfer having  
 “ been executed,—no intimation given till the 7th of  
 “ August, after Mr. Stuart had left Britain, and that  
 “ intimation containing no demand to be received as  
 “ partners, but merely a prohibition to pay to other  
 “ parties, as in the common case of intimation as a  
 “ diligence. And it is rather to be inferred from the  
 “ circumstance of the entry in the register not having  
 “ been made till after the actual bankruptcy of  
 “ Mr. Stuart, that the pursuers were not, in fact, in  
 “ any doubt as to the nature of the assignment.

“ The great difficulty, therefore, which I feel in the  
 “ case is, that as the assignment was, in fact, taken only  
 “ as a security, and the intimation of it was evidently  
 “ intended merely to take such security as the shares  
 “ afforded (whether competent to be so done, or not) ;  
 “ and further, as there was not, in fact, any transfer

“ which could either have bound Mr. Stuart on the  
 “ one hand, or the company on the other,—to find the  
 “ defender liable to a positive loss upon these shares of  
 “ stock would be to decide contrary to the clear inten-  
 “ tion and bona fides of the transaction out of which  
 “ the claim arises, and to give the pursuers an unjust  
 “ advantage upon the bankruptcy of Mr. Stuart, for  
 “ which they never bargained, and which they are only  
 “ attempting to obtain, in consequence of an act of the  
 “ defenders, which was not and could not be intended  
 “ to place them in the situation from which alone it  
 “ could legally arise. The claim has too much both of  
 “ the appearance and of the substance of an undue  
 “ catch, contrary to the truth and justice of the case.

“ At present, therefore, I am inclined to think that  
 “ the pursuers have failed to establish their claim  
 “ against the defenders, and that the interlocutor of  
 “ the Lord Ordinary ought to be altered, and judgment  
 “ of absolvitor pronounced in favour of the defenders.”

*Lord Mackenzie.*—“ I concur in the above opinion.”

On advising these opinions, the Court, on the 1st of  
 March 1833, adhered to the interlocutor of the Lord  
 Ordinary.\*

Allan and Son appealed.

*Appellants.*—From the facts of this case, it is clear  
 that the purpose of the transfer was not to divest  
 Mr. Stuart, and to confer an absolute right to the shares  
 in favour of the appellants, but merely to give to them  
 an effectual security for repayment of the money which

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\* 11 S. & D., p. 487.



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Mr. Stuart owed to them. Although it was clothed with the forms of a sale, it was, in truth, merely a pledge; and it is not pretended that a party who has got a transfer merely in security is responsible as a partner. In the case of the East Lothian Bank, Turnbull intended to acquire the shares, not as a security, but in absolute property; and in an action brought against him by the seller, to complete the transaction in terms of the bargain, by taking a transfer agreeably to the provisions of the contract, the Court held that he was bound to do so. He thus stood in the position as if a proper formal conveyance, under the contract of sale, had been made, so that when the action was brought against him by the East Lothian Bank as the partner, substituted in place of the seller, he had obviously no defence. But in the present case, the contract made with Mr. Stuart was not one of sale; and he never could have insisted in an action against the appellants to the same effect as the seller maintained his action against Turnbull. Besides, as the right of the appellants' action was incomplete, as not being made in terms of the contract of the company, Mr. Stuart cannot be held as divested, and consequently they cannot be regarded as substituted in his place. They are liable to account to Mr. Stuart, as his trustees, for any reversion which may remain after payment of their debt, so that he is the true proprietor; whereas, if the doctrine of the respondent be correct, that the appellants are also liable, the anomalous consequence would take place, that two parties having separate and distinct rights are proprietors of the same stock.

*Respondent.*—Although the present transaction, when fully investigated, turns out to be of the nature of a



security, yet it by no means follows that the appellants have not incurred the personal responsibility of partners. The decision of the question depends upon the mode and form in which they presented themselves to the company. They acquired, *ex facie*, an absolute assignation to the shares, and intimated their acquisition of them by a formal intimation, without giving the slightest notice of the existence of any back bond. That document may be available as between Mr. Stuart and the appellants, but it can have no effect whatever as between the appellants and the company. The question, therefore, comes to be, whether there is any relevancy in the plea of the appellants, that they did not observe the precise form of conveyance prescribed in the contract of copartnery. It is not disputed that that form has been complied with in substance, although not in its precise words; and such being the case it is obviously not competent for the appellants to found any plea on this circumstance. It is in the power of the company, either to enforce the observance of the form, or to dispense with it altogether. The form was made for their benefit, and cannot be pleaded against them. This principle was recognised and established in the case of the *East Lothian Bank v. Turnbull*.

LORD DENMAN.—My Lords, this case appears to me to resolve itself into points which are of no great difficulty. Mr. Stuart was a member of the Leith Glasshouse Company, under a deed of copartnery which authorized the assignment of shares, and under that deed he made an assignment, in terms as large as language could supply, to the gentlemen who are now the appellants before your Lordships. Those gentlemen inti-

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mated that assignment to the Company, and thereby represented themselves to have become the assignees of those shares. The question is, whether they are now liable, not only to all the future claims which may be made upon the members of that Company, but also to be declared members of that Company, in consequence of the act which they have done? The able argument on the part of the appellants, to show that they are not so liable, has rested altogether upon two points; one of which is, that in point of fact they were not assignees, but that they possessed only a security upon those shares; that they held them as mortgages, and were liable to account for them to the mortgager; and consequently that they could not be considered as altogether assignees of the property. I confess, that it appears to me that it does not lie in their mouth to make that defence; because, after having fully represented themselves to the Company as being in the situation of assignees (unless something can be shown which shall convince your Lordships that the situation of the parties has been altered by the mode in which the assignment has taken place), I do not see how it is possible for them to deny that they are assignees to the full extent of the language in which they have so described themselves. I have not been inattentive to the observations of that high authority, Lord Moncreiff, upon this subject, particularly the security; and I must own, that if it were not for the deference with which I must regard every thing that falls from that learned person, I should say, that the argument by which he seeks to show that the Company knew that the appellants were mortgagees, would not be entitled to so much weight as every thing that falls from his Lordship is; but I think, notwithstanding, that there

is nothing to make it apparent that this Company did not fully believe that they were dealing with the appellants as assignees, and I think that the nature of their dealing together is that which defines the relation in which they stand to one another. There are certain forms which it is said have not been complied with. In the first place, the ninth clause of the deed of the Company imposes upon any member parting with his share the duty of offering it to the Company first of all, that they may purchase it, if they think proper, and it does not appear that that was done on the present occasion; and I understand, that in point of fact it was not done. But it appears to me, that the answer given at the bar to that objection is quite satisfactory—that that is a privilege reserved for the Company for their own benefit, which privilege they were at liberty to renounce, if they thought proper; and I think that what passed between the parties can be taken in no other light, than that they did, in point of fact, renounce it, because they received intimation of the assignment, and they made no objection to these gentlemen holding the place that had been formerly held by Mr. Stuart. Then, under the twelfth clause, a particular form of assignment is described, and no doubt it is convenient for the Company, and for all who are members of the Company, that that particular form should be followed, but that is a mutual convenience which either party is at liberty to waive, and which I take it that both parties have waived on the present occasion. It was ingeniously urged, that the appellants were misled by the statement being conveyed in the manner in which it was, and that if it had been brought to their notice, on the form being tendered to them for their execution, that they were expected to

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become partners, in that case they would have thrown back the bargain they were about to make, and would have refused to become purchasers; but I think that that is rather an ingenious than a solid observation, because, if they were purchasers, they were to state themselves as assignees, and to claim all the right which assignees could have, and which rights, in fact, constitute the beneficiary partnership. I think it would be too strong to suppose that they would for a moment have hesitated to execute that form of transfer, if it had been submitted to them. I therefore think, that in all those respects, they have on all sides waived the particular advantage which the deed provided for each party, and that they must be taken to have put themselves in the same situation as if they had complied with all those forms. The case which has been referred to, of *Weatherly v. Turnbull*, clearly turns upon the point, which I think ought to be excluded from the present consideration; whether the defender in that case was a vendee, or merely a mortgagee; and the Court having held that he was a vendee found, that as between the parties all the consequences must follow. Then in the following case of the Bank of East Lothian against the same gentleman, the question was, whether that defender should pay up the instalments due upon the shares, and should also become a partner and member of the Company. The Bank having brought the action against Turnbull, as a partner, to make a certain advance on the shares purchased from Weatherly, and he having set up the defence, in the first place, that he was a mortgagee, and, in the second place, that the forms had not been complied with, the Lord Ordinary found that the three shares of the said Company belonging to David Wea-

therly were neither transferred by him, nor accepted by the defender, in the presence of one of the directors; the said defender, by the transaction founded on, was not fully constituted a member of the said Banking Company, or considered liable for the debts and obligations due and contracted by them. But the Court unanimously altered, and decerned in terms of the libel; that is, they held not only that he was bound to pay the share then due, but also that he was, to all intents and purposes, a member of the Company. It seems to me that is a case quite in point; and although there is certainly in this case an apparent intention to be a mortgagee, and not to be a vendee, yet as the representation made by the appellants to the Company was that they were assignees, in the most absolute and unconditional terms, the Company had a right to act upon that statement; and I therefore humbly recommend to your Lordships that the decree should be affirmed; and I beg leave at the same time to add, that it seems to me that the judges in refusing costs have acted in a very prudent manner, because it certainly is desirable on the part of the public, that the Company should comply with all such forms as their own deeds require, and also, considering the weighty doubts entertained in the Court below, it would not probably appear to your Lordships proper that the judgment should be affirmed with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

A. DOBIE—GEORGE WEBSTER, Solicitors.

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No. 15. The MAGISTRATES of DINGWALL, and Mrs. MUNRO of ROSE, now ROSS, Appellants. — *Lord Advocate (Jeffrey)*—*Rutherford*.

The Honourable Mrs. HAY M'KENZIE of Cromarty, and CAPTAIN MUNRO, Respondents. — *Attorney General (Campbell)*—*Robertson*.

Et é contra.

*Res Judicata — Fishing.* — Circumstances under which it was held (affirming the judgment of the Court of Session), that a decree in 1725, and another in 1778, constituted res judicata as to a right of fishing in the river Conon: And, in interpreting these decrees, certain boundaries laid down as marking the extent within which the parties had a right of fishing.

1ST DIVISION.  
Lds. Corehouse  
and Newton.

TWO questions were brought under review by this appeal, the one being, whether a decree in 1725 and another in 1778 formed res judicata; and the other being, where a line of march mentioned in the latter decree was truly situated. The question as to the situation of the march gave rise to very voluminous proceedings: And being of a special nature, it is not necessary to report them in detail. The circumstances out of which these questions arose were the following:—

The river Conon in the county of Ross takes its rise in Strathconon, and, after passing through various districts

of the country, empties itself into that part of the sea called the Cromarty Frith, a little below the town of Dingwall. Although now generally called, throughout its course, the Conon, a part of it, extending upwards from its junction with the sea to a point which was not precisely ascertained, was anciently called the Staffack or Stavack. The family of Seaforth, who possessed property on the banks, held right to the fishings in the Conon; and these having been adjudged, Charles II., on the 30th of September 1678, granted a charter of novodamus under the great seal, by which he gave to the adjudging creditors “superiores et inferiores” “salmonum piscarias de Conon, cum piscariis lie cruive” “fishings ejusdem aquæ de Conon.” This charter was ratified by parliament, and infestment taken. After certain intermediate transmissions, the right came to be vested in the Earl of Cromarty, who made up titles by charter of resignation in 1722. The Earl having been engaged in the rebellion of 1745, his estates were forfeited, and vested in commissioners. Thereafter they were restored to the heir male of the family of Cromarty, and ultimately were acquired by the respondent, Mrs. Hay M’Kenzie, who obtained a crown charter in 1819, on which she was infest. In 1825 she granted a tack of the fishings to the other respondent Hugh Munro.

On the other hand, the Magistrates of Dingwall, in 1587, obtained from James the Sixth a charter of confirmation and novodamus of certain subjects, “nec non” “cum salmonum piscatione in aqua de Stavack et suis” “pertinen.,” &c. In 1618 the Magistrates granted to Ronald Bain “totam et integram piscationem dimidii” “unius cimbi aquæ de Stavack communitate dicti” “burgi.” This and two other similar rights, after cer-

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No. 15.      tain intermediate transmissions, were acquired in 1720  
 12th April    by Colonel Munro, and flowed from him by a series of  
 1834.          titles to the appellat Miss Munro, afterwards Mrs. Rose,  
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In 1725 Colonel Munro raised an action of declarator and molestation against the Earl of Cromarty and his tenants, stating that they had taken violent possession of that part of the fishing belonging to him, and therefore concluding to have his right declared, the possession restored, and these parties interdicted from troubling him in future, and found liable in damages. In defence, they pleaded that they had a preferable right to the fishings claimed by Colonel Munro; and a day having been assigned to them for producing their title, they failed to do so, whereupon the term was circumduced against them, and decree of declarator pronounced in terms of the libel, which was extracted.

Again, in 1762, an action of declarator, molestation, and damages was brought by the commissioners on the forfeited estates of the Earl of Cromarty, and the Lord Advocate on behalf of the Crown, setting forth that although, under the titles vested in the Earl of Cromarty, they had right to the whole fishings in the Conon, yet the Magistrates of Dingwall had presumed to “ fish  
 “ salmon in the said water of Conon, and in the sea  
 “ opposite to the mouth of the said water, whereby the  
 “ shoals of fish were broken, and prevented from  
 “ coming up to the water as usual.” “ And albeit  
 “ it be of verity that the said defenders, the Magis-  
 “ trates and town council of the burgh of Dingwall,  
 “ have no right of fishing upon the said water of  
 “ Conon, and that the pursuers have suffered great  
 “ damage by their so doing, and are put to con-

“ siderable expense in defending their just right against  
 “ the illegal intrusion and encroachments of the de-  
 “ fenders, and that the pursuers have often desired and  
 “ required the defenders to desist from fishing on the  
 “ said water, and to have made payment to them of the  
 “ damages and expenses sustained by them as aforesaid ;  
 “ yet they refuse so to do, and still persist to vindicate a  
 “ pretended right to the said fishing, without any  
 “ foundation in law or equity : Therefore it ought and  
 “ should be found and declared, by decret of our  
 “ Lords of Council and Session, that the pursuers, as  
 “ commissioners and trustees foresaid, and their tacks-  
 “ men, have the only good and undoubted right to all  
 “ and whole the salmon fishings of the said water of  
 “ Conon, with the cruives, corfehouse, and whole parts,  
 “ pendicles, and privileges thereunto belonging ; and  
 “ that the magistrates and town council of Dingwall  
 “ have no right or title to fish upon the said water of  
 “ Conon, or in the sea opposite to the mouth of the  
 “ said water, by drag and stell-nets, or by cruives, yairs,  
 “ or in any other manner of way whatsoever : And it  
 “ being so found and declared, the said magistrates and  
 “ town council of Dingwall, and their successors in  
 “ office, for themselves, and as representing the com-  
 “ munity of the said burgh, ought and should be  
 “ prohibited and discharged from troubling and molest-  
 “ ing the pursuers and their tenants in the quiet and  
 “ peaceable possession of the said salmon fishing in all  
 “ time coming.”

To this action defences were lodged by the magis-  
 trates, who contended that they had right to that  
 part of the fishings in the Conon called the Stavack ;  
 and, after some procedure, they brought a counter action

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of reduction and declarator against the commissioners and certain parties deriving right from them, in which they concluded for reduction of any titles held by these parties in that part of the Conon called Stavack, and that it should be found and declared “ that the said  
 “ pursuers, and their successors in office, for themselves,  
 “ and as representing the community of our said burgh  
 “ of Dingwall by virtue of their rights above mentioned,  
 “ have the only good, undoubted, and exclusive right  
 “ of salmon fishing with their own proper boats or  
 “ cobbles and nets, and all other fishings on the said  
 “ water of Stavack, and whole parts, pendicles, and  
 “ privileges thereunto belonging; and that the said  
 “ defenders, nor none of them, have any right or title  
 “ to fish upon the said water, or any part or portion  
 “ thereof, or in the sea opposite to the mouth of the  
 “ said water, in any manner of way whatsoever; and  
 “ ought to be decerned, by decret foresaid, to desist  
 “ and cease from usurping any such right, and from  
 “ troublinging and molesting the said pursuers, or their  
 “ successors in office, in the peaceable possession,  
 “ bruiking, and enjoying thereof, or any part thereof, in  
 “ all time coming.”

In defence, the commissioners denied that the magistrates had any right to fish in the Conon, or that the Stavack formed a part of that river. The process of reduction was remitted to the action of declarator at the instance of the commissioners; but although it was repeatedly mentioned in the pleadings that they had been conjoined, no interlocutor to that effect could be found. The cases then came to depend before Lord Auchinleck, who, on the 24th of February 1763, found  
 “ that the limits of the fishings to which the contending

“ parties have right require a further proof than has  
 “ been hitherto brought, before judgment can be given  
 “ upon them; and therefore allowed either party to  
 “ prove what they shall think may be of use in the  
 “ determining the matters in dispute between them.”

A proof was accordingly taken and reported, on which  
 memorials were ordered. The processes then fell asleep;  
 but, in 1770, a summons of wakening was executed by  
 the commissioners in relation to the action at their  
 instance, and it was wakened accordingly. But it did  
 not appear that any summons of wakening was brought  
 as to the reduction at the instance of the magistrates.  
 After the processes had again fallen asleep, the commis-  
 sioners wakened their action; but there was no evidence  
 that this was done by the Magistrates. The whole case  
 was then reported to the Court on informations, which  
 were drawn on the assumption that both actions were  
 before the Court.

On advising these informations, their Lordships, on  
 the 24th of January 1778, pronounced this interlocutor :  
 “ The lords find that the commissioners of the  
 “ annexed estates have not produced a sufficient title  
 “ to the whole fishings of the river Conon; but find  
 “ that the magistrates and town council of Dingwall  
 “ have produced a sufficient title to the fishings in the  
 “ said river opposite to their property, from the march  
 “ at Breakenord down to the sea; therefore not only  
 “ assoilzie the said magistrates and council from the  
 “ action brought against them by the said commissioners,  
 “ but decern to the effect foresaid in the action at their  
 “ instance against the said commissioners, and declare  
 “ accordingly.” This interlocutor became final, but  
 was not extracted.

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On the 19th of April 1825 Mrs. Hay M'Kenzie and Captain Hugh Munro, her tenant in the fishings in the river Conon, raised an action of molestation, declarator, and damages against the appellants, and their joint tenant John Stevenson, setting forth that the appellants had taken upon themselves, not only to fish in the river Conon, "and encroach upon the rights of the pursuers, as proprietrix and tacksman foresaid, by fishing with net and cobble in the said river Conon, and particularly in that part called the new pool, opposite the lands of Breakenord, but have violently obstructed and prevented the pursuer, the said Hugh Munro, and the fishermen employed by him, from exercising their just right of fishing in the said river and pool; that the said John Stevenson has moreover lately been in the practice of making use of stationary nets stretched across the bed of the said river, and of having recourse to other novel and illegal modes of fishing for the purpose of obstructing salmon and other fish in their passage up the river, wherein the said Honourable Mrs. Maria Hay M'Kenzie, and the said Hugh Munro, as her tacksman, have, as above mentioned, the sole and exclusive right of fishing." They therefore concluded to have it found that they "have the only just and legal right of fishing with net and coble, and in every other way and manner competent by law, in the river Conon;" and that the appellants "have no right or title to fish for salmon in the said river Conon with net or coble, or in any other way;" and also that they "have no right of fishing in the said river Conon;" and "have no right to fish or make use of stationary nets stretched across the bed of the said river, or any other illegal mode of fishing calcu-

“ lated and intended to intercept and prevent the passage of the fish up the river at any time, or to employ persons to disturb the said fishings by such illegal and unwarrantable operations, or to obstruct the fishermen employed by the said pursuers, or either of them.” They further concluded for damages, and for interdict to the above effect.

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In defence, the appellants pleaded that the right of fishing, and salmon fishing in the Conon particularly, below the march between Balblair and Breakenord, belonged to the town of Dingwall, in virtue of the charter granted by James the Sixth in 1587, confirming two prior charters in 1497 and 1226; that the town, its tenants and feuars, had always exercised the right of fishing, and salmon fishing in the Conon; that the appellant Mrs. Ross had right thereto as a feuar from the town; that her right had been confirmed by the decree in 1725; and that of the town, as well as hers, by the decree pronounced in 1778; and therefore the subject matter of this action was *res judicata*.

To this it was answered, 1. That the judgment in 1725 went by default, and, being a decree in absence, could not be founded upon as decisive of the merits; and, 2. That the judgment in 1778 was incompetent, because the commissioners had no proper title to pursue, in respect that the Crown could only be represented by the officers of state; that it had been pronounced in a process which was asleep, and had not been conjoined with the other process; and at all events it limited the right of the magistrates to fish in those parts only of the river which were “opposite their property,” whereas they insisted for a much more extensive right.

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After the record was closed \* the respondents made a motion to the Lord Ordinary for an interdict to prohibit the appellants from fishing above the march between the lands of Balblair and Breakenord; whereupon the Lord Ordinary pronounced this interlocutor:—  
 “ 11th March 1828.—The Lord Ordinary having heard  
 “ counsel for the parties upon the whole cause, and in  
 “ particular upon the demand now made for an inter-  
 “ dict against the defenders to fish above the march  
 “ between the lands of Balblair and Breakenord, in  
 “ respect it is averred that the defenders have been  
 “ fishing above the said march, which, by their admis-  
 “ sions on the record, they are not entitled to do,—in  
 “ the meantime prohibits, interdicts, and discharges  
 “ the said defenders, or any of them, their tenants,  
 “ servants, fishers, or dependents, from fishing or killing  
 “ salmon in any part of the river Conon above the line  
 “ delineated on the plan in process as the march be-  
 “ tween Balblair and Breakenord; but, in respect the  
 “ defenders do not admit the said line is accurately  
 “ laid down in the plan, without prejudice to the par-  
 “ ties, to ascertain the exact march between Balblair  
 “ and Breakenord before the interdict is declared per-  
 “ petual.”

Both parties reclaimed against this interlocutor; but neither having the record attached to their notes, the Court, (31st May 1828,) refused both notes, as being incompetent.†

The case then returned to the Lord Ordinary; and

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\* See a question arising in preparing the record, 5 S. & D., 339. (new ed. 314.)

† 6 S. & D., 899; and see p. 1105, and 7 S. & D., 899, and 5 W. & S., 351, as to the question of breach of interdict.

on advising pleadings as to the defence of *res judicata*, his Lordship, on the 12th of November 1828, pronounced this interlocutor:—“ The Lord Ordinary  
 “ having considered the revised cases for the parties,  
 “ productions, and whole process, finds that the ex-  
 “ tracted decree in 1725, and the final judgment of  
 “ the Court in 1778, mentioned in the pleadings in  
 “ this case, form a *res judicata* between the parties in  
 “ the actions to which they relate, their representatives,  
 “ and those in their right; finds that the decree in  
 “ 1725, though pronounced upon a circumduction for  
 “ not satisfying the production ordered by the Court,  
 “ cannot competently be opened up in this action;  
 “ finds that the final judgment in 1778 applies both to  
 “ the declarator at the instance of the commissioners  
 “ for managing the forfeited estates, and the Lord  
 “ Advocate, against the Magistrates of Dingwall, and  
 “ the counter declarator at the instance of the Magi-  
 “ strates of Dingwall against those commissioners, the  
 “ officers of state, and others; finds that the pursuers  
 “ in the present action are not now entitled to plead  
 “ that the declarator at the instance of the magistrates  
 “ was asleep at the time the judgment in 1778 was  
 “ pronounced, or that the two declarators had not been  
 “ conjoined, in respect that the evidence of wakening  
 “ and conjunction depends upon warrants which, after  
 “ the lapse of twenty years from the date of the judg-  
 “ ment, it is not necessary to produce; finds that the  
 “ words ‘ opposite to their property,’ in the judgment  
 “ 1778, are demonstrative, and not taxative; and there-  
 “ fore finds that the magistrates of Dingwall, and those  
 “ in their right, have a sufficient title to the fishings in  
 “ the river Conon from the march at Breakenord down

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No. 15. “ to the sea, and to that effect assoilzies the defenders  
 12th April “ from the conclusions of this action, and decerns; but  
 1834. “ in respect parties are not agreed as to the march  
 MAGISTRATES “ between the lands of Balblair and Breakenord, ap-  
 of DINGWALL “ points the pursuers to put in a condescence,  
 v. “ specifying what they aver to be the situation of the  
 M'KENZIE. “ march, and allows the defenders to answer the same,  
 “ and in the meantime continues the interdict: Farther,  
 “ in respect the pursuers allege that the defender  
 “ Stevenson has been fishing, and is continuing to fish,  
 “ in an illegal manner, appoints them to put in a con-  
 “ descence of what they aver on this point, and  
 “ allows the defender to answer the same;—the conde-  
 “ scence now ordered to be lodged within three  
 “ weeks, and the answers by the box-day in the  
 “ Christmas recess.”

Both parties again reclaimed; the respondents pray-  
 ing the Court to alter the interlocutor, and decern in  
 terms of the libel; and the appellants, to limit the in-  
 terdict, and find them entitled to expenses. The Court,  
 on the 20th of January 1829, refused both notes without  
 saying any thing as to the matter of expenses.\* When  
 the case returned to the Lord Ordinary the appellants  
 moved his Lordship to award to them the expenses  
 which had been incurred prior to the date of his inter-  
 locutor of the 12th November 1828. But his Lordship  
 having doubts as to whether he had power to do so, the  
 appellants presented a note to the Court, praying for a  
 remit to the Lord Ordinary to hear parties as to these  
 expenses; but their Lordships, on the 10th of February  
 1829, refused the note as incompetent.\*

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\* 7 S. & D., p. 383.

The case then came before Lord Newton (in the absence of Lord Corehouse); and after a good deal of intermediate procedure, his Lordship, on the 10th of July 1830, pronounced this interlocutor: — “ Remits the cause to the Jury Court, in order to ascertain the point where the march betwixt the lands of Balblair and Breakenord touches the river Conon.”

The respondents reclaimed against this interlocutor; and the Court having required the parties to specify in a minute and answers their respective averments as to the situation of the march, their Lordships, on the 5th of March 1831, “ in respect of what is contained in this minute and answer, recal the Lord Ordinary’s interlocutor of 10th July 1830, and remit to his Lordship to proceed accordingly.”

Lord Newton, on the 11th of March 1831, pronounced this interlocutor: — “ The Lord Ordinary having, in terms of the remit by the Court of 5th March current, considered the closed record and whole process, and heard counsel for the parties thereon, finds, that by the words ‘ the march at ‘ Breakenord,’ as used in Lord Corehouse’s interlocutor of 12th November 1828, is meant, as shown by the subsequent part of that interlocutor, the march betwixt the lands of Balblair and Breakenord, and that it is not now competent to inquire in what sense these words were employed in the interlocutor in the former process of 24th January 1778: Finds that as the parties are now agreed as to the precise situation of the march betwixt these lands, it is unnecessary to inquire further into this matter; and that the line so agreed upon forms, where it touches the river, the western limit of the fishings belonging to the defen-

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No. 15.      “ ders; but, in respect the march so ascertained does  
 12th April    “ not correspond with the line delineated in the old  
 1834.         “ plan of 1763 as the march betwixt Balblair and  
 MAGISTRATES    “ Breakenord, recalls the interdict imposed by the in-  
 of DINGWALL    “ terlocutor of 11th March 1828, and decerns: That  
 v.                “ justice, however, may be done to the pursuers, in  
 M'KENZIE.     “ case this interlocutor should be altered, ordains the  
                   “ defenders to keep an account of the number of salmon  
                   “ taken by them in the pools named Pool Oure and  
                   “ Pool Breakenord, from this time till the final de-  
                   “ termination of this point in the cause: Finds the  
                   “ defenders entitled to the expenses incurred by them  
                   “ subsequent to the interlocutor of the Court of  
                   “ 20th January 1829; allows an account thereof to be  
                   “ given in, and remits to the auditor to tax the same,  
                   “ and to report; reserving consideration of the previous  
                   “ expenses until the final issue of the cause.”

“ *Note.* — The Lord Ordinary, conceiving that any  
 “ ambiguity which there may be in the final interlo-  
 “ cutor of 12th November 1828 is removed by the  
 “ subsequent part of that interlocutor, and that the  
 “ meaning of Lord Corehouse, or of the Court, in  
 “ adhering, can admit of no doubt, holds himself pre-  
 “ cluded from considering what was the march intended  
 “ by the Court in their interlocutor of 24th January  
 “ 1778; but were it competent to him to entertain  
 “ this question, he is of opinion, on an attentive con-  
 “ sideration of the proof taken in the former process,  
 “ that the sense in which Lord Corehouse has under-  
 “ stood the interlocutor is the just and correct one.  
 “ As to expenses, the Lord Ordinary thinks the defen-  
 “ ders clearly entitled to those incurred in the inquiry  
 “ into the true situation of the march betwixt Balblair

“ and Breakenord, as to which their averments have  
 “ turned out to be correct. He has reserved consider-  
 “ ation of the previous expenses, as involving a question  
 “ of competency, on which counsel were not prepared  
 “ to speak.”

The respondents having reclaimed, the Court, on the  
 17th of June 1831, pronounced this interlocutor: —

“ Recall the interlocutor reclaimed against (except in  
 “ so far as it recalls the interdict), and find that it is  
 “ competent to inquire in what sense the words ‘ the  
 “ ‘ march at Breakenord ’ were used in the decree  
 “ 1778; for that purpose allow the parties to give in  
 “ Cases on the import of the evidence in process, so  
 “ far as concerns this point, and in particular on the  
 “ import of the proof led, the pleadings and other  
 “ proceedings in the cause on which the decree 1778  
 “ proceeded.”\*

Cases having been prepared accordingly their Lord-  
 ships, on the 16th of February 1832, pronounced this  
 interlocutor:—“ The Lords, considering it material to  
 “ ascertain the exact situation of the Fishers Lodge,  
 “ before answer, remit to James Jardine, whom failing,  
 “ Robert Stevenson, engineers, to prepare a plan of  
 “ the water of Conon and adjoining banks, from the  
 “ upper end of the island Baen to the sea, and to de-  
 “ lineate thereon the situation of the Fishers Lodge, in  
 “ reference to its real situation, and to the situation  
 “ as marked upon Sangster’s plan, and also to delineate  
 “ such other objects as shall appear to him to be of  
 “ importance to the question at issue.” Mr. Jardine  
 having made a plan and report, the Court, on the

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\* 9 S. & D., p. 761.

No.15. 6th July 1832, “remitted to Mr. Jardine to describe on  
 12th April “his plan a line corresponding as nearly as possible with  
 1834. “the black line described on Sangster’s plan as the  
 MAGISTRATES “fishings and the march at Breakenord.” The case  
 of DINGWALL was put out for final advising on the 11th of July 1832,  
 v. whereupon the appellants lodged a minute, stating that  
 M’KENZIE. they were “informed that Mr. Jardine had actually laid  
 “down a line on his plan, intersecting the river near  
 “the top of Pool Oure, but that subsequently, in  
 “consequence of some communication with their Lord-  
 “ships in the robing room, another line had been laid  
 “down in a totally different situation, without the  
 “defenders having had any opportunity of knowing the  
 “grounds on which this result has been arrived at;”  
 and praying that Mr. Jardine should be ordained to  
 lodge a report in terms of the remit, and that the  
 appellants might be allowed to object to it if they saw  
 cause. The Court ordered “this minute to be with-  
 “drawn as incompetent, and as not containing an  
 “accurate statement of the facts;” and at the same  
 time they pronounced the following interlocutor:—  
 “The Lords having resumed consideration of this  
 “reclaiming note, with the revised cases, and interlocu-  
 “tor of this Court 17th June 1831, and plan and  
 “report by James Jardine, civil engineer, dated the  
 “9th day of March last, and proof on which the de-  
 “cree 1778 proceeded, and heard the counsel for the  
 “parties,—they of new recall the interlocutor of  
 “Lord Newton, of 11th March 1831, and find that  
 “the ‘march at Breakenord,’ used in the decree  
 “1778, is the Fisher’s Lodge on the south side of the  
 “river Conon, or on Island More, and the letter P at  
 “the bend eastward of the burn Ousie on the north

“ side: And the said James Jardine having, by the  
 “ direction of the Court, drawn a red line from the  
 “ point denoting ‘Ruins of Fisher’s Lodge,’ on the  
 “ plan in process made by him across the water of  
 “ Conon to the letter P aforesaid, they find and declare  
 “ the said red line to be the march, in respect to the  
 “ right of fishing salmon in said water, betwixt the  
 “ pursuers and defenders, and that the defenders have  
 “ no right of salmon fishing higher up than the said  
 “ line, and the pursuers no right below it; and the  
 “ Lord President and Adam Rolland, principal Clerk  
 “ of Session, have, with reference to this judgment,  
 “ certified the said line on Jardine’s plan in process, by  
 “ putting their names along it, and decern: Find the  
 “ defenders liable in the pursuers expenses since the  
 “ date of the remit to the said James Jardine, and in  
 “ his charge for survey, plan, and report, and remit  
 “ the account thereof to the auditor of Court, to tax  
 “ and report: And farther, the Lords remit to Lord  
 “ Fullerton, in place of Lord Newton, deceased, to hear  
 “ parties on the account of the number of salmon taken  
 “ by the defenders beyond the line of march, as hereby  
 “ adjusted, referred to in the Lord Ordinary’s inter-  
 “ locutor of 11th March 1831, and all objections  
 “ thereto, and to do therewith, and with any other  
 “ points in the cause not disposed of, as shall be  
 “ just.”

The Magistrates of Dingwall and Mrs. Rose appealed against the interlocutor of the 11th of March 1828, in as far as it granted interdict; of that of the 31st of May 1828, refusing their reclaiming note as incompetent; the interlocutor of 12th November 1828, containing the interdict, and that of the 20th adhering thereto;

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the interlocutor of the 10th of February 1829, refusing their note relative to expenses; also certain subsequent interlocutors relating to matters of form; that of the 17th of June 1831, recalling the remit to the Jury Court; and the interlocutors of the Court dated 16th February and 6th and 11th July 1832. On the other hand, the respondents appealed against the interlocutor of the 11th of March 1828, in regard to a statement of certain facts contained in it; the interlocutor of the 31st of May 1828, refusing their reclaiming note as incompetent; the interlocutor of the 12th of November 1828, sustaining the plea of *res judicata*; and the interlocutor of 20th January 1829, adhering thereto.\*

*Mrs. Mackenzie and Mr. Munro, Appellants.* — *Res Judicata.*—There are two decrees founded on as separately constituting a *res judicata*. The first is that of 1725, but it was not of the proper nature of a decree. It was not pronounced *causâ cognitâ*, and though the defenders appeared, yet they afterwards passed from their appearance before any proper *litis-contestation*. The interlocutor was pronounced in absence, and was a mere certification for not implementing an order of Court, or at the utmost was only a sentence of *circumduction* for not producing documents. It was an echo of the conclusions of the summons, which, in the absence of the defenders, the Court was bound implicitly to adopt. But such a decree does not constitute *res judicata*.† Neither can the other decree of 1778 support a plea of *res judicata*. There were two actions,

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\* It is unnecessary to go into a detail as to all these points, and therefore this report is confined to the questions of *res judicata* and the boundary.

† *Malcolm v. Henderson*, 27th Nov. 1807, A. B., 19th May 1815. Fac. Coll.

one of declarator by the Commissioners against the Magistrates of Dingwall, and a counter action of reduction and declarator by the magistrates against the commissioners. These processes were never conjoined, and the one at the instance of the magistrates fell asleep. Notwithstanding this a decree was pronounced in their favour, on the erroneous supposition that their action was before the Court ; and besides that decree was never extracted. It has been said that this objection resolves into an objection to the grounds and warrants, and that as twenty years have elapsed it is not competent to make any such objection ; but the doctrine as to the effect of lapse of time on grounds and warrants applies only where the decree has been extracted. Independent of this, the decree is merely declaratory of the import of the title then before the Court, and it therefore cannot affect any other title, or be carried beyond the specific title to which alone it refers. But other and more important titles have been produced in this action. The plea of competent and omitted cannot exclude the respondents from founding on these titles, because such a plea does not apply to pursuers.

*Answered.*—The proceedings which terminated in the decrees of 1725 and 1778 are final, and have not been attempted to be opened up by reduction or otherwise. They must therefore receive full effect in the present question ; for whether in absence or in foro they must necessarily stand until overturned, and it is only after this has been done that it is competent to resume the merits of the question.\*

It is not true that the decree of 1725 was in absence.

\* *Maule v. Maule*, 31st Jan. 1827, 5 S. & D., 256 (new ed. 238.) ; *Erskine*, b. iv. tit. 3. sec. 3. ; *Erskine*, b. iv. tit. 1. sec. 22.

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Both parties appeared, and it was maintained by the defenders that the pursuers had not a sufficient title, and that, even if they had, the defenders offered to prove a preferable title. The Court sustained the pursuers title, but allowed the defenders till 1st June to produce a preferable title. An act was extracted, but no such title was produced; and on the 20th June the term was circumduced, and decree of declarator pronounced. That decree has stood unchallenged for upwards of a century, and its validity was recognized in the subsequent proceedings. The decree in 1778 was the result of a long and anxious litigation. There were mutual declarators, in which each party claimed right to certain fishings. Although the interlocutor of conjunction has disappeared, it is stated in the pleadings that in point of fact the actions were conjoined, and as it is admitted that the action, at the instance of the commissioners, was not asleep, the other process must have been in the same position when the decree was pronounced. But it is incompetent to aver, after the lapse of so many years, either that the processes were asleep or partly asleep; and the presumption is, that as one interlocutor disposed of both they had been conjoined, and were not asleep. Besides, no competent process has been brought for setting the decree aside.

*Magistrates of Dingwall and Mrs. Ross, Appellants.*  
 —*Boundary.*—On this matter the statements of the parties were of a very special nature, and incapable of being made intelligible without reference to a plan. It was however maintained by the appellants, that the line of march had been finally fixed by the interlocutors of the 12th of November 1828, and 20th of January 1829; that the procedure in regard to the report of Mr. Jardine

was irregular and incompetent; and that the line drawn by direction of the Judges, and fixed by the interlocutor of the 11th July 1832, was inconsistent with that fixed by the interlocutor of 20th January 1829, and irreconcilable with the true meaning of the decree of 1778, and did not correspond with the line laid down in Sangster's plan.

*Answered.*—The interlocutor of the 11th July 1832 is correct; the Judges were as much entitled to direct Mr. Jardine to draw the proper line of the march on the plan as they were to direct the clerk of Court to write out their judgment.

LORD DENMAN.—My Lords, this is an action of molestation, declarator, and damages, relating to the right of fishing in the river Conon. The respondents, who were the pursuers below, complained against the magistrates of Dingwall, for infringement upon their right to the fisheries in that river; and the magistrates have defended themselves on the ground that they possess a sole right in the water called the Stavock, which they state is part of the same river, and that they have established their right to fish in those parts where the pursuers say they have no right. The point in dispute was about four hundred yards in length, in the river Conon, including a very valuable salmon fishery. It appeared very clearly, from ancient documents, that each of those parties had established his right to some fishery in each of those waters; and I think it appeared also pretty clear that the right in the water of Stavock must be taken to be a right of fishery in the same river Conon; so that the only question was where the boundary was to be fixed, and whether the pursuers or the defenders

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were entitled to take in that part of the water with respect to which the question arose? The rights and charters upon which they relied certainly did not appear to throw any light upon this subject. There was no such description as enabled either party to say, here is my paper, with the description of my right, and by looking at that you will see at once where I have a right to come; and therefore it was absolutely necessary to inquire into the fact of usage and enjoyment, and to see how far each party had in truth exercised the right claimed. It seems that in the year 1763 another action had been commenced between the Commissioners of Forfeited Estates, including Lord Cromarty's property, (he being the author of the pursuers, and having enjoyed the right of fishing in the Conon, as to which they complain of disturbance,) and the present defenders, the magistrates of Dingwall, for the very same acts of molestation which are now complained of. The magistrates of Dingwall therefore insisted that the decision of the question upon that occasion, which assoilzied them to a certain extent, was a *res judicata*, which fixed the rights of the parties, and prevented the pursuers from making any complaint with regard to what was done on the present occasion. The first question was whether that could be taken as a *res judicata*; whether the Commissioners of the Forfeited Estates did so far represent the property as that any act of theirs could bind those who now possess it? But in the course of the argument it turned out that there was no substantial reason to doubt that they were the proper parties, and that objection therefore was done away. In that action, then, the right of the defenders was established by the Court up to a certain point, which the Court described in their judgment by a red line;

that is, up to the march of Breakenord, opposite to their own property. It was almost impossible for any words to have been used more fruitful of future litigation.

There was a *judicata*, but as to the *res*, it was extremely difficult to understand what the thing was that the Court decided upon, because every part of that description is open to a great deal of doubt. It is extremely unfortunate that the Court in the year 1778, when that judgment was pronounced, did not do what the present Court of Session did in deciding this case, namely, have a plan accurately drawn, and then draw their own line, and show where the rights of the parties began and ended, because that would have made an entire end of all those questions which have arisen since; but neither did they do that, nor did they describe it by metes and bounds, or by fixed objects, so as to make it at all satisfactory as a description of the boundary. It is quite clear, that as the judgment was that the right was up to a certain point, it must be matter of evidence to ascertain what that point was; and this, in truth, ultimately became the whole question which was argued at your Lordships bar. In the course of the proceedings in the present cause Lord Corehouse directed a condescendence as to where the march began between Breakenord and Balblair? That was not following the terms of the judgment, but it was rather taking for granted that the judgment meant to describe that the boundary, that is, the march of Breakenord, was a march between Breakenord and Balblair. The respondents admitted that the line between Breakenord and Balblair was the particular line of which we have heard so much; but then they said that the march of Breakenord described in the judgment could not mean that parti-

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cular line, but another march—a march of fishings; and that that was a line derived from a certain point called the Fishers' Lodge across the river to a certain stream which is now called by the name of the Burn of Ousie. The question therefore as to where the line was drawn changed its form: the appellants said that the boundary was a march between Breakenord and Balblair; the respondents said no; the march of the fishings is a line drawn from the Fishers' Lodge across the river to the opposite point. The Court of Session had therefore that question to try, and after a great deal of investigation they have adopted the latter as the true line; and the question for your Lordships is, whether they have done wrong in coming to that decision? After having given the best attention in my power to the case, it appears to me not only that there is no ground for saying that the Court were wrong, but that there is every reason to believe that they were precisely right, and have hit the exact boundary defining the rights of the parties. There are two or three circumstances which make that appear a very probable conclusion; first of all, the fact of the fishers' lodges being erected in that spot, is a very strong proof that that was the extent to which the parties had a right to come. Why those lodges should be erected at a point which would appear to make a concession of any part of the territory one cannot very easily see. Then the evidence of a witness was taken, who was called by the defenders in the suit in the year 1778, a witness of the most unexceptionable kind — a witness of whom the defenders could by no means complain — a witness who had actually enjoyed their right of fishery, and had taken it under them, so that what he described as the right he enjoyed could hardly fail to be the very

right. Now, he describes it in a manner precisely correspondent to the red line which has been drawn by the Court of Session on the present occasion; that is, beginning at the fishers' lodges, and going across to the Burn of Ousie. Then, there is another fact (and I merely select these as striking facts), namely, that the very boundary appears to have been agreed upon; that it had been actually placed there; that the fishers acting under the corporation of Dingwall and also the fishers acting under the Earl of Cromarty's family in the higher part of the river had met and agreed upon the boundary which was to define their right. Now, these are certainly facts which seem to me to be of a striking description, and appear fully to warrant and show there was evidence fully sufficient to sustain the finding of the Court of Session. In the course of the proceeding there was another document referred to which was the subject of very great discussion: it was a plan made under the direction of the pursuers in the former case; a plan by a Mr. Sangster, which exhibited a line called the line of march between Balblair and Breakenord; and it seems to me that the strongest arguments by far that have been urged on the part of the appellants in this case are founded on that document; because, certainly, it is extremely difficult to conceive how any document of that kind at that time should happen to contain the march between Breakenord and Balblair unless it was for the purpose of defining what the real boundary was. That certainly was the boundary claimed by the defenders in the course of that suit, and it is very frequently stated by their witnesses as that on which they relied as the point at which they had fished. But, at the same time, the reason for drawing that line and the authority

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under which it was drawn are points on which the House appears to me to be left in entire ignorance; and there is a great deal to be assumed before it is possible to apply it as evidence in the present case. Whether it was done by Mr. Sangster himself for his own amusement, or by the appellants, or by the respondents, or by the Court, it appears to be quite inapplicable to the case until it is distinctly proved for what purpose it was done. No reference is made to it in the judgment; no statement is made in the plan of the purpose for which it was drawn; and it appears to be left in as much obscurity as it is possible to conceive. It is not at all impossible that, with some such view as the Court of Session lately directed Mr. Jardine to draw a line coincident with their view, they may have desired Mr. Sangster to draw this line merely for the purpose of seeing whether it would correspond with what they conceived to be the real boundary, and that their inspection may have convinced them that it could not be so. If that had been their object, it would perhaps have been more natural for the Court of Session to negative that line between Breakenord and Balblair; but still it seems to leave it in a degree of doubt, which renders that document of very little value in the case when it comes to be considered. But there is one fact regarding that document which makes it almost impossible for the appellants to avail themselves of it when the whole is taken into account; because, though the line passes as the march between Balblair and Breakenord, it plainly leads to the other side of two valuable pools which are now in dispute, and places them to the west, that is, at the appellants' side of the boundary line. Even supposing that to be the line, in all respects it cannot be

correct, for it is not reconcilable or consistent in all particulars; and therefore it appears to me to be very difficult to make any use of it, so as to decide the matter between the parties. There was one other circumstance alluded to, with reference to this description, and that is, that the respondents, (who are appellants in the cross-appeal,) wish to make the description given by the Court of Session in some degree qualified, by inserting the words which appear in the former judgment, namely, the words "opposite to their own property." It does not appear to me that those words necessarily mean any limitation of the right of fishing, but that that may be very fairly taken as one of the circumstances of description which in some degree tends to show the place that was pointed out, inasmuch as Breakenord was the property of the corporation; that they may have a right to come up to that point, and there to fish opposite to their own property. That probably is the sense in which the Court of Session in the year 1778 used those words; but it seems to me that it does not add much to the certainty of the description. There is only one other circumstance to which I need allude, which is a supposed irregularity in the Court of Session in drawing this boundary, as if they had proceeded without proper openness and publicity, and without the knowledge of the parties. But it appears to me that that which savoured in some degree of imputation at one period of the argument is most satisfactorily explained, and that nothing of an improper kind took place upon that occasion; but that inasmuch as the Judges retired into another room with the surveyor, and directed him to draw the plan, which they afterwards produced as

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explaining their own judgment, they only did that which is constantly done in every court of justice, namely, directing some one to hold the pen for them and draw their decree; and they adopted that decree afterwards, and pronounced what they had required him to draw as the line which they were disposed to pronounce as the real boundary line determined by their judgment. It appears to me, therefore, that in all respects the Court of Session have done what is right upon this subject, and my humble motion to your Lordships is that this judgment should be affirmed; and I apprehend, that as these matters have all arisen from the carelessness of the pursuers (the defenders in the former action), and as very great doubts have arisen in consequence of the ignorance of the parties as to the real extent of their right, that ought to be done without any costs.

The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

RICHARDSON and CONNELL—SPOTTISWOODE and  
ROBERTSON, Solicitors.

[13th May 1834.]

JOHN HUNTER, W. S., Appellant.—*Dr. Lushington—Anderson.* No. 16.

Mrs. GEORGE and others, Trustees of the late JAMES GEORGE, Respondents.—*Lord Advocate (Jeffrey) — Murray.*

*Bill of Exchange.*—Circumstances under which it was held, without reference to oath (affirming the judgment of the Court of Session), that a party was not an onerous bonâ fide holder of a bill, and that the bill having been granted without value, he was not entitled to recover.

*Process.*—Question as to the competency of the Inner House in the Court of Session, in reviewing an interlocutor of a Lord Ordinary which does not exhaust the cause, pronouncing a new one which has that effect.

CHARLES M'Donald acted for some time as agent in Huntly for the Aberdeen Banking Company. On the 2d of January 1830 he applied to Alexander Reid and James George for their joint acceptance for 160*l.*, which they granted; and at the same time he addressed a letter to Reid, in these terms:—

“ Sir, Huntly, January 1830.

“ Having this day received your and Mr. James George's acceptance to me for 160*l.* sterling, pay-

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“ able six months after date, I promise to pay the  
 “ same when due, as it is for my behoof.

“ I am, &c.

“ CHARLES M'DONALD.”

“ Mr. Alexander Reid.”

Two days afterwards a bill for 200*l.* was accepted by Reid and George in favour of M'Donald, and the former bill was thereupon destroyed. On this occasion M'Donald addressed to Reid a letter in these terms:—

“ Sir, Huntly, 4th January 1830.

“ I have this day received your and Mr. James  
 “ George's acceptance to me for 200*l.* payable  
 “ twelve months after date, which bill I promise to pay  
 “ when due. I am, &c.

“ CHARLES M'DONALD.”

“ Mr. Alexander Reid.”

These letters were given by M'Donald to Reid. M'Donald was at this time deeply indebted to the bank, and they took possession, on the 6th, of the whole books and papers which could be found in his office; and on the following day he executed a trust disposition for behoof of his creditors in favour of the bank. The appellant, (who was the brother-in-law of M'Donald, and acted as his law agent,) admitted that some days after the seizure of the papers by the bank he went to Huntly, and then became aware that M'Donald had executed a trust deed, but he denied that he was at that time made acquainted with the terms of the deed. He also admitted that the bill for 200*l.* was indorsed to him by M'Donald posterior to the exe-

ention of the trust deed, and alleged that it was indorsed in satisfaction of a business account due by him to M'Donald.

James George died in July 1830, and the bill fell due on the 7th of January 1831, by which time Reid had become bankrupt, and it was not then protested. About three months after it fell due Hunter raised an action before the Court of Session against the respondents as the representatives of James George, concluding for payment of the contents of the bill for 200*l*. In defence the respondents pleaded that Hunter was not an onerous bonâ fide holder, and that as it was proved by the letter of 4th January 1830 that the bill was an accommodation one to M'Donald, he had no right to recover. The Lord Ordinary, on the 2d of February 1832, pronounced this interlocutor:—" Finds, in the  
 " circumstance of the case as admitted by the pursuer,  
 " that he is not entitled to the privileges of a bonâ  
 " fide and onerous indorsee; but in respect that the  
 " defenders do not found upon the letter from  
 " M'Donald, the drawer, to Reid, as conclusive evi-  
 " dence that the bill was an accommodation to the  
 " drawer, in so far as George was concerned, but  
 " refer to books and other documents on this subject,  
 " remits to Mr. Joseph M'Gregor, accountant in Edin-  
 " burgh, to examine the said books and documents, to  
 " call for such others as may be competent to produce,  
 " to hear parties, and thereafter to report to the Lord  
 " Ordinary; and in the meantime appoints intimation  
 " of the dependence of the action to be made to the Aber-  
 " deen Banking Company."

Both parties reclaimed; the respondents praying to be assolizied, and the appellant that the interlocutor should

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be recalled, and consideration reserved as to whether he was an onerous bonâ fide holder, till it should be ascertained whether the bill had been granted for value or not.

The Court, on the 24th May 1832, pronounced this interlocutor: — “ Recall the interlocutor of the Lord  
 “ Ordinary, in so far as it proceeds on the ground  
 “ of the defenders having declined to found on the  
 “ letter from M'Donald to Reid; also recall the remit  
 “ to Mr. M'Gregor, accountant, as unnecessary;  
 “ and in respect that by the foresaid letter the bill  
 “ libelled on is proved to have been signed by James  
 “ George only as an accommodation bill, and that  
 “ the pursuer is not entitled to the privileges or cha-  
 “ racter of an onerous indorsee, assoilzie the defenders  
 “ from the conclusions of the libel, and decern:  
 “ Find the pursuer liable to the defenders in ex-  
 “ penses, &c.”\*

The appellant then presented a petition to the Court, maintaining that the interlocutor was ultra vires, in respect that it exhausted the whole merits of the cause, which it was alleged was incompetent, seeing that the cause was brought before the Court for review of an interlocutor of the Lord Ordinary, which did not exhaust the cause, and not by a report on cases. The Court, on the 1st June 1832, refused the petition with additional expenses.†

Hunter appealed, contending that the interlocutor of the 24th May 1832 was incompetent; that there were no circumstances sufficient to justify the finding that he was not an onerous bonâ fide holder, and that the letter

\* 10 S. & D., p. 561.

† 10 S. & D., p. 604.

to Reid was not competent to establish that the bill was an accommodation one by George.

On the other hand, the respondents maintained that it was in the power of the Court, when reviewing the judgment of a Lord Ordinary, to alter it, and to decern or assoilzie as they saw fit; that the admitted facts that the appellant was the brother-in-law and the law agent of M<sup>c</sup>Donald, and that he had got the bill after he knew that M<sup>c</sup>Donald had a trust disposition, and that he gave no present value, were sufficient to show that he was not an onerous bonâ fide holder; and that although the letter was addressed to Reid, it established the fact that the joint acceptance was for the accommodation of M<sup>c</sup>Donald.

LORD WYNFORD.—My Lords, this is an action by Hunter, the indorsee of a bill of exchange, against the representatives of one George, who was, along with one Reid, an acceptor of that bill. The defenders alleged that the bill was drawn for the accommodation of the drawer M<sup>c</sup>Donald, in support of which they produced a letter from the pursuer Hunter to Reid, and they pleaded that the pursuer was not entitled to the privileges of a bonâ fide and onerous indorsee. The Lord Ordinary found, that in the circumstances of the case, as admitted by the pursuer, he was not entitled to these privileges; but he also found, that the defenders did not refer to the letter from the pursuer to Reid as conclusive evidence that the bill was an accommodation to M<sup>c</sup>Donald, the drawer, in so far as George was concerned, but referred to it along with books and other documents; and he therefore remitted the case to an accountant, to examine these books and documents, and call for such others as might be competently produced,

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and to report. Both parties complained of this interlocutor, the pursuer (who is the present appellant) praying that the Court would, in hoc statu, recall the interlocutor, in so far as it found that he was not entitled to the privileges of a bonâ fide and onerous indorsee, and that they would reserve the consideration of that question till the prejudicial question,—whether the bill was granted without value, in so far as the acceptor George was concerned, was determined. The First Division of the Court recalled the interlocutor, in so far as it proceeded on the ground that the defenders had not founded on the letter from M'Donald to Reid as conclusive evidence of the bill being an accommodation one, and also the remit to the accountant as unnecessary; and they held, that the bill was proved to have been signed by George as an accommodation bill, that the pursuer was not entitled to the character or privileges of an onerous indorsee, and assoilzied the defenders. The pursuer has appealed to your Lordships against both these interlocutors. He did not ask the Court of Session to send this case to the Jury Court; and the prayer of his reclaiming note seems to import that he wished the Judges to decide the case without the intervention of a jury; but his counsel have insisted, that, as the case depended on disputed facts, and on the sufficiency of the proof of those facts, and on the conclusions to be deduced from the facts proved, neither the Court below nor your Lordships could decide it, and that a jury was the only competent tribunal. In support of this argument they referred your Lordships to an opinion, said to have been delivered in this House by the Lord Chancellor, in the case of Macdonald v. Mackie. The Lord Chancellor thought that that case

ought to be tried by a jury, because it did not appear from the evidence on which the Court had decided what the contract was on which the action was founded, or what was the extent of the obligation imposed on the defender. In the course of his address to the House in that case his Lordship complained of the prolixity and confusion of the Scotch pleadings, of the pleader jumbling together law and fact; and expressed a wish that questions of law and fact might be kept distinct, and that the former should be referred to the Judges and the latter to juries, as they are in England. But the Lord Chancellor did not say that the Court of Session is bound to send all cases of disputed facts to a jury, and that they cannot decide them; and when I told him that it had been stated at your Lordships bar that he had so decided he expressed his surprise. The Court of Session is a court of equity as well as of law; and although in complicated cases the Courts of Equity send questions of fact to be tried by jurors, they often decide on matters of fact without the assistance of a jury. Besides, the act of 6th George 4. cap. 120, settles this question. There are certain actions which must be sent to the Jury Court; but an action on a bill of exchange is not one of those actions. In all but the enumerated cases it is left to the discretion of the Court of Session either to decide on the facts or send the case to a jury. But it has been separately insisted, that it is to be presumed in all cases that an indorsee holds the character and is entitled to the privileges of a bonâ fide onerous indorsee, until that presumption is removed by the confession of the party or by writings. But an indorsee who has obtained a bill by fraud from the indorser, or to whom it has been indorsed by col-

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lusion with the indorser for the purpose of cheating creditors, would not be likely to confess that he was not a bonâ fide holder, or to furnish any written evidence that would destroy his right to sue on the bill indorsed to him. Such a rule, if generally acted on, would be a cover for every species of iniquity. The modern cases show, that evidence raising a suspicion of fraud prevents the application of this rule, and lets in circumstantial evidence to prove the want of bonâ fide consideration for the indorsement. There is in this case, from the admission of the pursuer himself, most urgent evidence of fraud. He admits, by his answers to the condescence, that the bill was indorsed after the execution of the trust-deed by M<sup>c</sup>Donald the indorser, although he says he was not informed of the contents of that deed, and he denies that it conveyed the right to that bill. If he was not informed of the contents of the deed, how could he deny that it conveyed that bill? If he was informed of the contents of the deed, he must have known that it did convey away from the indorser all his property, and of course that bill. He was the brother-in-law and the law-agent of the indorser, and he admits that the indorsement was made after the bank (to which the indorser was agent) had, in consequence of his having acted unfaithfully to his employers, seized on all his property. He does not pretend that any money was advanced at the time of the indorsement; the consideration, he says, was business done as law-agent; but there is no proof of any business being done, and the bill was never protested, and no action was brought on it until seven months after it was due. Now, if he was a creditor of the indorser, could any court or jury doubt that that indorsement was made to give an undue pre-

ference to the pursuer ; or, if he was not, to accomplish a fraud on the indorser's honest creditors? There are several cases the judgments in which break in on the old rule said to prevail in ancient times in Scotland ; a rule which could only have been endured when bills of exchange were never drawn or indorsed except in the course of trade, and as the means of paying commercial debts that were justly due. It is a rule not suitable to the present times when so many bills are manufactured and circulated for the purpose of enabling insolvent persons to get deeper in debt. There are several cases in the books, in which the Court of Session has not required a reference to be made to the oaths of the holders of bills as to the true bona fides of the indorsements of such bills. In the case of *Campbell v. Dryden\**, the defender accepted a bill for the accommodation of the persons who indorsed it to Campbell, who was their law-agent. Campbell was in advance to the indorsers, who became bankrupts, and he brought an action on the bill. Dryden pleaded that he was not an onerous holder ; and the Court of Session, on the report of an accountant as to the state of the transactions between Campbell and the indorser, held that the nature of the case took it out of the general rule,—that onerosity can only be proved by writ. The report does not show what the state of the transactions between the indorsers and Campbell was ; but I may venture to say, that it could not present more pregnant evidence of suspicion than the facts admitted by the pursuer. In that case your Lordships have a precedent which authorizes you to say, that you are not prevented from look-

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\* Nov. 25, 1824 (3 S. & D., new ed. 230.)

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ing into all the circumstances of this transaction; and your Lordships will, I think, confer a great benefit on Scotland by giving your sanction to this precedent to which I have referred you, and to the judgment of the Court below. On these grounds I humbly recommend your Lordships to dismiss this appeal, with costs, to be paid by the appellant when the amount shall have been ascertained by one of the officers of this House.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of 200*l.* for their costs in respect of the said appeal.

SPOTTISWOODE and ROBERTSON — D. M. JOHNSTON,  
Solicitors.

[16th May 1834.]

JAMES STUART, Superintendent of Police, THOMAS CRIGHTON, some time one of the Judges of Police, and JOHN THOMSON, clerk to the Police Commissioners, Edinburgh, Appellants. — *Attorney General (Campbell)*—*Lord Advocate (Jeffrey)*. No. 17.

WILLIAM KELLY, Tailor, Edinburgh, Respondent.—*Murray—Milne.*

*Reparation.*—By statute 3 Geo. IV. c. 78. s. 134. (Edinburgh Police Act) it is provided, that “no action shall be commenced against the Judges, &c. for any thing done in the execution of this act, in any case, unless wilful corruption or oppression, or culpable negligence, out of which real injury has arisen, be charged.” In a summons of damages against a Judge of the Police Court, and others, on account of proceedings in the Police Court, issuing in the imprisonment of the pursuer, he averred that they were incompetent, malicious, wilfully oppressive, and unwarrantable; and in the condescendence he stated facts which amounted to a charge of wilful corruption and oppression, out of which real injury arose: Held (affirming the judgment of the Court of Session), that the summons and condescendence were relevant, although the precise words of the statute were not used.

KELLY raised an action before the Court of Session against the appellants, setting forth in the summons, “That on or about the 14th day of November last a petition and complaint to the acting judge in the

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“ police court of Edinburgh was presented at the in-  
 “ stance of James Stuart, superintendent of police and  
 “ procurator fiscal of court, for the public interest,  
 “ against Michael Cannan, broker, St. Mary’s Wynd,  
 “ Edinburgh, and Mary Cannan his wife, charging  
 “ them with assault and breach of the peace, on which  
 “ a warrant was granted for their apprehension: That  
 “ on the 15th day of said month of November, being a  
 “ Sunday, the pursuer subscribed a bail bond to the  
 “ extent of 5*l.* for the due appearance of the said  
 “ Michael Cannan to answer the diets of court for  
 “ trying the complaint, and thereupon the said Michael  
 “ Cannan was liberated: That on the 16th day of that  
 “ month, being the day fixed for the trial, the said  
 “ Michael Cannan was prevented by indisposition from  
 “ attending; and, in consequence of this fact being stated,  
 “ the diet of court was adjourned till Friday the 20th  
 “ of same month, as appears from the police records:  
 “ That upon that day there appears the following minute  
 “ of court:—‘ Edinburgh, 20th November 1829.—The  
 “ ‘ complaint having been read over, the defender  
 “ ‘ Michael Cannan having failed to appear, grants  
 “ ‘ warrant to apprehend and bring him into court to  
 “ ‘ be examined; continue the diet against the other  
 “ ‘ defender. (Signed) *C. Muirhead.*’ That during  
 “ the afternoon of the same day the pursuer was first  
 “ apprised of the non-attendance of Cannan by the  
 “ following petition and complaint, which was then  
 “ served upon him:—‘ Unto the honourable the judge  
 “ ‘ acting in the police court for the city of Edinburgh,  
 “ ‘ and liberties of the same, and adjoining territory  
 “ ‘ over which the police act extends, humbly complains  
 “ ‘ James Stuart, superintendent of police and pro-

“ ‘ curator fiscal of court, for the public interest, that  
 “ ‘ William Kelly, tailor, south back of Canongate, by  
 “ ‘ his bail bond in the books of this court, dated the  
 “ ‘ 15th day of November 1829, bound himself as cau-  
 “ ‘ tioner for Michael Cannan, broker, St. Mary’s  
 “ ‘ Wynd, under a penalty of 5*l.* sterling, that he should  
 “ ‘ appear at all diets of court, but which party failed  
 “ ‘ to appear on the 16th day of November current, in  
 “ ‘ the prosecution at the instance of the complainer  
 “ ‘ against him. May it therefore please your honour  
 “ ‘ to grant the necessary orders for levying the said  
 “ ‘ penalty, and for imprisoning the said cautioner, in  
 “ ‘ terms of the police act, 3 Geo. IV. cap. 78. § 115.  
 “ ‘ According to justice, &c. (Signed) *Jas. Stuart,*  
 “ ‘ superintendent.’ That on this complaint the fol-  
 “ ‘ lowing deliverance was made:—‘ Edinburgh, 20th No-  
 “ ‘ vember 1829.—The judge appoints the before-  
 “ ‘ named cautioner to be cited by constables of court  
 “ ‘ to pay 5*l.* sterling, the before-mentioned penalty, to  
 “ ‘ the clerk of court, within twenty-four hours after  
 “ ‘ such service, with certification. (Signed) *C. Muir-*  
 “ ‘ *head.*’ That in order to protect himself against the  
 “ ‘ forfeiture of his bond, the pursuer, instantly on re-  
 “ ‘ ceiving this notice, attended at the police office, and  
 “ ‘ in consequence of his exertions and assistance, certain  
 “ ‘ of the police officers succeeded in apprehending and  
 “ ‘ bringing him to the police office about eight o’clock  
 “ ‘ of the same evening: That on the next day the fol-  
 “ ‘ lowing sentence was pronounced in the complaint  
 “ ‘ against Cannan and his wife:—‘ Edinburgh, 21st No-  
 “ ‘ vember 1829.—The judge finds this complaint  
 “ ‘ proved against the defenders by the witnesses before  
 “ ‘ named and designed, and therefore fines and amer-

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“ ‘ciates the defender Michael Cannan in ten pounds  
 “ ‘sterling, and ordains him to find caution for his  
 “ ‘good behaviour for twelve months, under the penalty  
 “ ‘of 20*l.* sterling, and failing his obtempering this  
 “ ‘sentence, to be confined in the tolbooth of Edin-  
 “ ‘burgh for a period not exceeding sixty days; and  
 “ ‘adjudges Mary Cannan to be confined eight days  
 “ ‘in the tolbooth of Edinburgh, and thereafter ordains  
 “ ‘her to find caution for her good behaviour for twelve  
 “ ‘months, under the penalty of 10*l.* sterling; and  
 “ ‘failing her finding such caution, to be confined eight  
 “ ‘days longer. (Signed) *C. Muirhead.*’ That not-  
 “ ‘withstanding that the pursuer had thus implemented  
 “ ‘his bond by the presentment of the said Michael  
 “ ‘Cannan in the course of the same day to which the com-  
 “ ‘plaint against him was adjourned, and on which his  
 “ ‘conviction had followed, the proceedings against the  
 “ ‘pursuer were not abandoned; for three days after  
 “ ‘Cannan’s conviction the following minute, under the  
 “ ‘hands of John Thomson, clerk to the commissioners  
 “ ‘of police, appears on the police records:— ‘Edin-  
 “ ‘burgh, 24th November 1829.—The clerk of court  
 “ ‘certifies that the above-named cautioner has not  
 “ ‘made payment in terms of the preceding order.  
 “ ‘(Signed) *John Thomson*, clerk.’ Upon which the  
 “ ‘following interlocutor was pronounced by Thomas  
 “ ‘Crichton, rectifier of spirits, Edinburgh, the acting  
 “ ‘judge of the police court:— ‘Edinburgh, 24th No-  
 “ ‘vember 1829.—The judge declares the above-men-  
 “ ‘tioned penalty of 5*l.* sterling to be forfeited, and  
 “ ‘grants warrant to officers of court to charge the  
 “ ‘above-named cautioner to make payment thereof to  
 “ ‘the clerk of court within ten days after the charge,

“ ‘ under certification of poinding and imprisonment.  
 “ ‘ (Signed) *Thos. Crighton.*’ That thereafter there  
 “ appears the following minute on record, under the  
 “ hands of the said John Thomson, as clerk foresaid:—  
 “ ‘ Edinburgh, 9th December 1829.—The clerk of  
 “ ‘ court certifies that the above-named cautioner has not  
 “ ‘ made payment in terms of the preceding order.  
 “ ‘ (Signed) *John Thomson,* clerk.’ And thereupon  
 “ the following deliverance by the said Thomas Crigh-  
 “ ton, as judge foresaid, was made:— ‘ Edinburgh,  
 “ ‘ 9th December 1829.—The judge grants warrant to  
 “ ‘ officers of court to levy the penalty of 5*l.* sterling  
 “ ‘ before mentioned, and also the expense of poinding  
 “ ‘ and sale, by immediate poinding and sale of the  
 “ ‘ goods and effects of the said cautioner. (Signed)  
 “ ‘ *Thos. Crighton.*’ That the officer employed to exe-  
 “ cute this poinding having returned an execution that  
 “ there was not sufficiency of goods whereon to levy  
 “ the penalty and expenses of poinding and sale, the  
 “ following sentence was then pronounced:— ‘ Edin-  
 “ ‘ burgh, 11th December 1829.—The judge grants  
 “ ‘ warrant to constables of court to incarcerate the  
 “ ‘ before named and designed William Kelly, cau-  
 “ ‘ tioner, in the tolbooth of Edinburgh; the keepers  
 “ ‘ whereof are hereby ordered to receive and detain  
 “ ‘ him for fifteen days from this date, if he is imme-  
 “ ‘ diately apprehended, or if otherwise, from the date  
 “ ‘ of his incarceration. (Signed) *Thos. Crighton.*’ That  
 “ by the act 3 Geo. IV. cap. 78. sec. 116. it is provided,  
 “ ‘ that a record shall be preserved of the charge, and of  
 “ ‘ the judgment’ pronounced by the police magistrates,  
 “ but no such record was kept or preserved in the pur-  
 “ suer’s case: That on the foresaid warrant the pursuer

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“ was taken by one of the police officers to the Edinburgh  
 “ lock-up house, and confined there during the whole  
 “ period of his sentence, along with other persons who  
 “ either had been tried and found guilty for criminal  
 “ offences, or who had been committed for trial: That  
 “ the cell where the pursuer was confined was a small,  
 “ damp, and unwholesome place, not exceeding six  
 “ feet by eight, with only one bed, and no other article  
 “ of furniture: That some time after being confined  
 “ here the pursuer’s health, from the close and  
 “ polluted air, became so much impaired that it was  
 “ found proper to remove him to one of larger dimen-  
 “ sions: his health, notwithstanding, still was affected  
 “ by his severe confinement, and he has not yet fully  
 “ recovered from the effects of it: That before his con-  
 “ finement, the pursuer was enabled, by means of his  
 “ earnings in his trade, to support his wife and family,  
 “ but since then, he has been thrown entirely out of  
 “ employment, and has no means of support: That  
 “ besides the injury occasioned to the pursuer’s health  
 “ by his said imprisonment, and his being left without  
 “ employment, he has suffered otherwise greatly in his  
 “ character and feelings, through the proceedings taken  
 “ against him: That by the act 56 Geo. III. cap. 42.  
 “ sect. 4. entitled ‘ An act to alter and amend two acts  
 “ ‘ of the 53d and 54th years of his present Majesty, for  
 “ ‘ erecting and maintaining a new gaol, and other  
 “ ‘ buildings for the county and city of Edinburgh;  
 “ ‘ and to alter and amend two acts of the 43d and 49th  
 “ ‘ years of his present Majesty, in regard to the statute  
 “ ‘ labour of the middle district of said county,’  
 “ which explains and defines the description of prisoners  
 “ to be confined in the lock-up house of Edinburgh, it

“ is enacted, ‘ That the said small gaol, or place of  
 “ ‘ temporary confinement (meaning the lock-up  
 “ ‘ house), shall not be held or considered as a prison  
 “ ‘ for the reception or confinement of debtors ; but the  
 “ ‘ same shall be held and considered, to all intents and  
 “ ‘ purposes, as part of the felons gaol :’ That by the  
 “ present Edinburgh Police Act, of the 3d year of our  
 “ reign, cap. 78. sect. 115. before mentioned, which  
 “ prescribes the forms to be observed in proceeding  
 “ against a cautioner in a forfeited bail-bond, it is  
 “ enacted, in the event of the non-payment of the sums  
 “ thereby due, and there not being sufficient effects of  
 “ the cautioner to discharge these sums and expenses,  
 “ that ‘ the cautioner or cautioners may be imprisoned,  
 “ ‘ by warrant of any of the said sheriffs depute or  
 “ ‘ substitute, or bailies or old bailies respectively, in the  
 “ ‘ tolbooth of Edinburgh, for a space not exceeding  
 “ ‘ thirty days :’ That the whole of the proceedings  
 “ against the pursuer, and more especially those  
 “ subsequent to the date of the presentment of the said  
 “ Michael Cannan, have been grossly irregular,  
 “ illegal, and wilfully oppressive, dictated by malice, or  
 “ arising out of the most gross and culpable negligence,  
 “ inasmuch as, 1st, the said bond is altogether irregular  
 “ and improbativ, neither holograph of the pursuer,  
 “ nor subscribed, or bearing to be so, before witnesses,  
 “ and because it was subscribed, and bears to have  
 “ been so, on a Sunday, and is therefore altogether null  
 “ and void. 2d. Even giving effect to the bond, the  
 “ pursuer, by his instant and timeous presentment of  
 “ the said Michael Cannan, after his failure to appear  
 “ had been intimated to the pursuer, sufficiently imple-  
 “ mented the terms of his bond ; and the subsequent

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 “ malicious, wilfully oppressive, and unwarrantable.  
 16th May “ 3d. The forfeiture of the pursuer’s bond is said to  
 1834. “ have been incurred by the non-attendance of Cannan  
 STUART “ on the diet of court of 16th November, on which  
 and others “ occasion he was prevented by indisposition from  
 v. “ attending, and the diet against Cannan, in consequence,  
 KELLY. “ continued by the Court till the Friday following.  
 “ The petition and complaint against the pursuer, on  
 “ which the warrant of imprisonment and other pro-  
 “ ceedings complained of proceeded, was thus altogether  
 “ irregular, unjust, and wilfully oppressive. The diet  
 “ having been continued by the Court against Cannan  
 “ on the 16th November, his non-appearance on that  
 “ day could not, without wilful and gross oppression,  
 “ have been made a pretext for forfeiting the bail found  
 “ by the pursuer. 4th. Supposing the pursuer’s bond  
 “ regularly forfeited, it could only warrant imprison-  
 “ ment as for a civil debt; and the pursuer’s impri-  
 “ sonment in a felons gaol was not only in gross violation  
 “ of the provisions of the foresaid statute, 56 Geo. III.  
 “ cap. 42., and the police statute above referred to, but  
 “ also the terms of the warrant of imprisonment itself;  
 “ and no record of the charge and judgment against  
 “ the pursuer having been preserved, as required by the  
 “ police statute, the consequent incarceration was far-  
 “ ther illegal, and wilfully oppressive and malicious:  
 “ That for these said irregular, illegal, malicious, and  
 “ wilfully oppressive proceedings, consequent imprison-  
 “ ment, and the consequent injury sustained by the  
 “ pursuer therethrough in his health, character, and  
 “ feelings, and also in his means of livelihood, the said  
 “ James Stuart, as prosecutor thereof,—the said Thomas

“ Crichton, the Judge by whose decision the pursuer’s  
 “ bond was declared forfeited, and the warrant for his  
 “ imprisonment granted,—as also the commissioners of  
 “ police of Edinburgh, as responsible for the regularity  
 “ of the proceedings of their officers,—and the Lord  
 “ Provost, Magistrates, and Town Council of the city of  
 “ Edinburgh, for themselves, and on behalf of and as  
 “ representing the whole body and community of the  
 “ city of Edinburgh, under whose control the gaols of  
 “ Edinburgh are placed, as responsible for the conduct  
 “ of their officer, in receiving and detaining the pur-  
 “ suer in the said felons gaol or lock-up house of Edin-  
 “ burgh, on the foresaid warrant, or pretended warrant,—  
 “ are all, conjunctly and severally, or severally, liable in  
 “ damages, and in solatium to the pursuer.” He there-  
 fore concluded that the defenders (appellants) “ should  
 “ be decerned and ordained, by decree of the Lords of  
 “ our Council and Session, conjunctly and severally, or  
 “ severally, to make payment to the pursuer of the sum  
 “ of 500*l.* sterling, in name of damages, and as a sola-  
 ‘ tium to the pursuer, for the injury sustained by him  
 “ as aforesaid, through the foresaid irregular, illegal,  
 “ wilfully oppressive, and malicious proceedings, and  
 “ consequent imprisonment of the pursuer in manner  
 “ before specified.”

Defences were lodged by the appellants; but although they objected that the summons was defective, in so far as it did not charge what it complains of as having been done without probable cause, yet no objection was made to its relevancy in other respects, and this objection was of consent repelled.

In his revised condescendence the respondent repeated the detail of the proceedings alleged in the summons; but he did not in words state that they were, as alleged

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in the summons, “irregular, illegal, wilfully oppressive,  
 “and malicious,” and productive of “consequent  
 “injury.” He, however, alleged, in the 17th article,  
 “that in consequence of the confinement the pursuer  
 “was seized with catarrh, and his health was perma-  
 “nently impaired; and he was thereupon admitted as  
 “a patient in the New Town Dispensary.” And he  
 averred, in the 18th, “that before the pursuer’s confine-  
 “ment, as above stated, he was enabled, by means of  
 “his earnings in trade, to support his wife and family  
 “of three children; but in consequence of his con-  
 “finement, and of the said injury to his health, he lost  
 “his employment, and was for many months deprived  
 “of all means of support; and, in addition to his loss of  
 “health, he has also suffered in his character and  
 “feelings from the above cruel and injurious treat-  
 “ment.”

In his pleas in law he pleaded that “the whole pro-  
 “ceedings against the pursuer were grossly irregular,  
 “incompetent, illegal, and oppressive.”

The appellants, in their pleas in law, objected that  
 “the action is excluded by the 134th section of the  
 “act 3 Geo. IV. cap. 78.”\*

By this section it is provided “that no action shall  
 “be commenced against the judges, commissioners,  
 “superintendent, or any other person or persons, for  
 “any thing done in the execution of this act, in any  
 “case, unless wilful corruption or oppression, or  
 “culpable negligence out of which real injury has  
 “arisen, be charged; nor in any event shall such  
 “action be competent after three calendar months  
 “from the time the fact is committed; and the defen-

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\* The Edinburgh Police Act.

“ ders in such action or process may produce this  
 “ act, and plead that the said things were done by  
 “ authority and in virtue thereof; and if these shall  
 “ appear so to be done, then and in that case the said  
 “ defenders shall be assoilzied from such action or  
 “ process, and the pursuers in such action shall be  
 “ found liable to pay the said defenders the whole  
 “ expenses of process incurred by the said defenders.”

The Lord Ordinary, on 20th December 1832, pronounced this interlocutor:—“ Finds, that the re-revised  
 “ condescence for the pursuer, on which the record  
 “ on his part is now closed, does not contain any of  
 “ those special allegations against the defenders, of  
 “ which one or other is, by the 134th section of the  
 “ 3d of Geo. IV. cap. 78., declared to be indispensable to  
 “ the support of any action against judges, commis-  
 “ sioners, superintendents, or any other person or  
 “ persons, for any thing done in the execution  
 “ of the said act; and therefore dismisses the action,  
 “ assoilzies the defenders, and decerns: Finds the  
 “ defenders entitled to expenses,” &c.

The respondent reclaimed to the First Division of the Court, who pronounced the following interlocutor:  
 “ —(22d January 1833.) The Lords having heard  
 “ counsel, and advised the cause, Find, that the state-  
 “ ments in the summons, taken along with these in the  
 “ condescence, are sufficient to support the action  
 “ as relevantly laid under the statute; therefore alter  
 “ the interlocutor of the Lord Ordinary reclaimed  
 “ against, repel the preliminary defence, and remit  
 “ to the Lord Ordinary to proceed with the cause:  
 “ Find the pursuer entitled to expenses,” &c.\*

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\* 11 S. &amp; D., p. 287.

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*Appellants.*—1. The appellants are public functionaries, upon whom the performance of very important public duties is imposed by the police statutes for the city of Edinburgh; and while they admit that they ought not to be altogether free from personal responsibility in the discharge of these duties, it is manifest that the useful and practical administration of the police of a great metropolis requires that those to whose management it is committed shall be protected against frivolous and vexatious complaints, and that the right of action against them for any thing done in their official capacity, shall be limited. This principle, which exists at common law in regard to magistrates and other inferior judges, has been invariably recognized in police legislation.

Accordingly, the 134th section of the Edinburgh Police Act provides that no action shall be commenced, or, in other words, shall be sustained as relevant against parties in the situation of the appellants, for any thing done in the execution of the statute, in any case, unless wilful corruption or oppression or culpable negligence shall be charged. This is the first limitation of the right of action,—that it shall be laid expressly upon one or other or all of these three grounds. Then follows the farther and most important limitation, that the wrongful actings of parties under the statute must be charged as having caused real injury to the party complaining. The statute contemplates no case in which an action shall lie against the members of the police establishment for any thing done in the execution of the act, out of which real injury has not arisen. This

particular quality of the alleged wrong attaches equally to wilful corruption, oppression, and culpable negligence, as affording a relevant ground or cause of action. For example, suppose a summons to be laid strictly in terms of the statute, and to charge wilful corruption, out of which real injury has arisen; it seems impossible to doubt that it would be relevant to meet such an action by the defence that the pursuer had sustained no real injury from the wilful corruption or wrong of which he complained. The same defence would be applicable to an action laid upon oppression followed by real injury, or upon culpable negligence coupled with a similar qualification; and in all these cases a failure, on the part of a pursuer, to prove real injury, or proof by a defender that no real injury had truly arisen from the wrongs complained of, would entitle the latter to be assolized.\*

If the appellants are right in their construction of the statute it is clear that neither the summons nor the re-revised condescendence contain statements "sufficient to support the action as relevantly laid under the statute." It is not set forth in the summons that real injury has arisen to the respondent from the proceedings on the part of the appellants of which he complains; he merely libels, that these proceedings "have been grossly irregular, illegal, and wilfully oppressive, dictated by malice, or arising out of the most gross and culpable negligence." But that which is introduced into the re-revised condescendence is incomparably weaker. There the respondent merely describes his treatment by the appellants as "cruel and injurious." This is the statement to which he

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Nimmo v. Stuart, 17th July 1832, 10 S. & D., p. 844.



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betakes himself in the pleading upon which he finally closed the record, and upon which the effect of the judgment appealed from is, to send the appellants to issue with him before a jury.

2. But the Court below have held, that, in judging of the relevancy of the action, the statements in the summons are to be taken along with those in the revised condescence; and the next question is, whether it be competent to supply any defect in the statement contained in the condescence, upon which the record has been closed, by a reference to the narrative of the summons?

According to the long established form of process in the Courts of Scotland, the purpose of a condescence is to enable a pursuer to set forth with precision the whole facts pertinent to his cause of action, and of which he is willing to undertake a proof in support of the same. The condescence cannot enlarge the grounds of action, as laid in the summons, but it may have and often has the effect of greatly narrowing them.

This principle was recognized by the Court even prior to the statute 6th Geo. IV. cap 120., in the case of Forteith against the Earl of Fife.\* The ground of action was laid upon judicial slander, and the summons expressly libelled malice. In the revised condescence the pursuer did not aver malice, and issues were prepared accordingly. But the Court found, "in respect that malice upon the part of the defender is not expressly averred in the revised condescence, the first four issues, as prepared by the jury clerk, are irrelevant to be tried by the jury."

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\* Forteith v. Earl of Fife, 18th Nov. 1820, Fac. Coll.

This rule is now enforced by statutory enactment, because the late Judicature Act ordains that “in such “condescence and answers, or mutual condescen- “dences, the parties shall in substantive propositions, “and under the distinct heads or articles, set forth “all facts and circumstances pertinent to the cause “of action, or to the defence, and which they respec- “tively allege and offer to prove.” It is manifest, therefore, that wherever a condescence becomes necessary the statute imperatively requires that a pursuer shall state therein the whole facts pertinent to his cause of action, and of which he is prepared to undertake a proof. The statement must be complete in itself, and relevant, without reference to the narrative of the summons to support the action. And so the Court below, with the single exception of the present case, have uniformly interpreted the statute.\*

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*Respondent.*—1. In construing the section founded on, it is clear that an action would be competent wherein the pursuer libelled either “wilful corruption” by itself, or “oppression” by itself, or “culpable negligence followed by real injury.” Any one of these charges might separately form a ground of action against individuals officiating under the act. It is also obvious that the quality of real injury attaches only to the last of these separate grounds of action with which it is coupled in the construction of the sentence; for it is natural to suppose that the legislature could never intend to encourage actions of damages against magistrates for

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\* Act of Sederunt, 11th July 1828; *Ross v. Hutton and Henderson*, 15th June 1830, 8 S. & D., p. 918.

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negligence merely, however culpable, unless real injury had therefrom arisen; whilst, on the other hand, wilful corruption or oppression, formed of themselves delicts of so flagrant a nature as to entitle a party to redress and damages, though bodily harm might not have actually occurred. But even if it be necessary to aver in the way contended for by the appellants, it is not requisite that the precise words of the statute be employed. It is sufficient if there be averments amounting in substance to what is required by the act.

Now, in the summons it is expressly stated, “that the  
 “ whole of these proceedings against the pursuer, and  
 “ more especially those subsequent to the date of the  
 “ presentment of the said Michael Cannan, have been  
 “ grossly irregular, illegal, and wilfully oppressive, dic-  
 “ tated by malice, or arising out of the most gross and  
 “ culpable negligence, inasmuch as, 1st,” &c. Then are set forth the reasons on which the respondent maintained that these proceedings showed wilful oppression as well as culpable negligence. The summons next proceeds:—“ That for these said irregular, illegal,  
 “ malicious, and wilfully oppressive proceedings, conse-  
 “ quent imprisonment, and the consequent injury sus-  
 “ tained by the pursuer therethrough in his health,  
 “ character, and feelings, and also in his means of live-  
 “ lihood, the said James Stuart, as prosecutor thereof,  
 “ the said Thomas Crighton, the judge by whose deci-  
 “ sion the pursuer’s bond was declared forfeited, and  
 “ the warrant for his imprisonment granted,—as also the  
 “ commissioners of police of Edinburgh, as responsible  
 “ for the regularity of the proceedings of their officers,  
 “ &c.,—are all conjunctly or severally liable in damages,  
 “ and a solatium to the pursuer;” and he afterwards

details explicitly the way in which he had so suffered. There is thus an express averment, both of wilful oppression and of culpable negligence, as well as of real injury sustained by the respondent in consequence thereof.

Then the facts and circumstances detailed in the re-revised condescendence, when taken together, support, and, if proved, will establish, the charges of oppression and culpable negligence, followed by the real injury libelled in the summons. In the 17th article of the re-revised condescendence the respondent explains the manner in which he sustained injury in his health by confinement for fifteen days in the cell of the felons gaol, where he was deprived of all comfort and proper sustenance; and in the 18th article he averred, “that before the pursuer’s confinement, as above stated, he was enabled, by means of his earnings in trade, to support his wife and a family of three children; but in consequence of his confinement, and of the said injury to his health, he lost his employment, and was for many months deprived of all means of support; and, in addition to his loss of health, he also suffered in his character and feelings from the above cruel and injurious treatment.”

It was not necessary to wind up the narrative of these special facts given in the condescendence with an inference or a repetition of the statement in the summons, that these facts made out a case of oppression; but, if it was so, this was done in the plea in law, where it was maintained, as a legal inference from the facts specially condescended on, that “the whole proceedings against the pursuer were grossly irregular, incompetent, illegal, and oppressive.”

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But further, the appellants, not having, in the proceedings complained of, observed the provisions of the Edinburgh police statute, and, on the contrary, having contravened and violated them, are not entitled to avail themselves of and plead the protection which that statute confers for any thing done "in the execution of the act," or "by authority and in virtue thereof."\* The respondent's allegation and plea is, that the whole proceedings adopted against him by the appellants were in direct violation of the statute which they refer to for protection,—but which protection is only conferred for what is done "in the execution" or "by authority" of the act; so that even though it could otherwise be maintained, that the summons and condescendence do not relevantly set forth and make out the charges of oppression and culpable negligence required by the statute, the appellants cannot competently insist upon the respondent stating or proving these charges at all, in consequence of their contravention of the act.

2. The object of a condescendence is to set forth facts in support of a summons, and not to embody grounds of action or statutory words. Accordingly, the Judicature Act provides, by section 8th, that "where the parties do not agree to hold the summons and defences as setting forth fully the facts and pleas respectively founded on, or where the Lord Ordinary shall think fit, he shall order the pursuer or defender,

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\* Anderson v. Campbell, 28th Feb. 1811, Fac. Coll.; Shand v. Henderson, 17th June, 1814 Dow's Reports, vol. ii. p. 519.; Goldie v. Oswald, 1st June 1814, Dow's Reports, vol. ii. p. 534; Strachan v. Stoddart, 13th Nov. 1828, 7 S. & D., p. 4.; Richardson v. Williamson, 1st June 10 S., D., 1832, p. 607.

“ as the case may be, to give in, the one a condescend-  
 “ ence, the other an answer or mutual condescendence,  
 “ setting forth, without argument, the facts which they  
 “ aver and offer to prove in support of the summons  
 “ and defences.”

The case of *Forteith v. the Earl of Fife* is inapplicable ; because, although the pursuer in his summons libelled malice, he in his condescendence not only abandoned that charge, but ascribed the slander to a different cause. In this respect, therefore, the statements in the condescendence not only fell short of and did not bear out the allegations in the summons, but expressly contradicted them.

LORD CHANCELLOR.—My Lords, this case is one of considerable importance, not only to the parties themselves, but to the rules of pleading in the Court below. It is of great importance that the protection given by Acts of Parliament conferring powers upon public functionaries, which bring them constantly into contact and frequently into conflict with members of the community who are, generally speaking, persons of precarious subsistence and circumstances, and even residence, should be made substantially available to the functionary, who may be unjustly sued for a breach of duty. On the other hand, it is very material, that, under the guise of protecting those functionaries against unjust actions, the remedy of those parties who may be injured by their malversation in office and their abuse of power should not be too much narrowed. The course which the Legislature has adopted in the act now under consideration, for the purpose of giving such protection, is this:— It contains a provision which has been usually made in

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all the English acts to the same effect, from the time of James the First downwards, with respect to magistrates and other functionaries. In the one hundred and thirty-fourth section a reasonable time (three months) is fixed within which the proceedings must be taken; notice (which is usually another protection afforded) I do not think is required here,—but the power of pleading (as we should say here) the general issue, and producing evidence upon it, seems to be given; and another protection (which I am not aware of being a usual protection afforded in such matters) is given, by requiring a specification in the action, of the charge upon which the action proceeds. This latter part of the section, upon which the question at present exclusively turns, may be taken in two senses. It may either mean to exclude all actions which in substance do not proceed upon corruption, oppression, or that which is reckoned equivalent to corruption and oppression—very gross negligence; that you shall not sue the magistrates, or you shall not sue the policemen, unless for that which amounts to corruption, oppression, or gross negligence: or it may mean (and that is the construction which is assumed on the part of the appellant, the magistrate, to be the sound construction) that the action shall not only not be maintainable for any thing short of that which amounts in substance, and is in its own nature corrupt, oppressive, or grossly negligent, but that there shall be an explicit charge in words by the party bringing that suit of corruption, oppression, or gross negligence. If the former of these constructions were the sound one, it would be unnecessary to dwell for a moment longer upon the facts of this case, or upon the construction of this act, or the course of procedure, with a view to support the

judgment of the Court below, and to sanction their reversal of the interlocutor of the Lord Ordinary; but I shall assume that it is the second construction which is the sound one, namely, that the pursuer must charge, as well as mean to charge, that which in substance amounts to corruption, oppression, and so forth; that he must not only have that as the foundation of his action, but that he must make the charge; and that, without his making the charge, the action cannot be maintained. Now, let us attend to the construction of this section, and see how far the pursuer has complied with the requisition of the section, and brought himself within that clause which provides, “that no action shall be commenced,”—every word is of importance, and none of more importance, in my view of the case, than that material word “commenced:”—“that no action shall be commenced against the judges, commissioners, superintendent, or any other person or persons, for any thing done in execution of this act, in any case, unless wilful corruption or oppression, or culpable negligence out of which real injury has arisen, be charged, nor in any event shall such action be competent after three calendar months from the time the fact is committed.” I throw out of view one argument on the part of the respondent, upon which it would be wholly impossible, in my view of the case, to defeat the appellants case and to maintain the judgment of the Court below, were there nothing more than that in the respondent’s case—namely, that this is not brought for any thing done in the execution of the act, but for something done in contravention of the act. We cannot for a moment admit that any such protective clause has a meaning of that description; for if a breach of the act

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took the case out of the protection, it is needless to observe that protection never would be afforded at all, since it is only where the act has not been strictly complied with,—since it is only in cases where there has not been a legal act done, that there is any occasion for protection. If it has been done according to the act, if it has been altogether lawful and justifiable, the magistrate wants no such protection as this. But passing that, we come to another part of the section, upon which an argument was raised on the part of the appellants, but upon which no material reliance was placed. It says, “unless  
 “wilful corruption or oppression, or culpable negligence out of which real injury has arisen, be charged.” Now, it was momentarily contended, and no more, that it was not merely necessary in the summons to charge corruption, and so forth, but that it should also have added, out of which arose the real injury whereof the pursuer complains. I am clearly of opinion that that is by no means required, and that it is perfectly sufficient if there is a charge of wilful corruption, and if there is an injury stated, in the manner which is now to be made the subject of remark. And here I have to observe, in the first place, that this is by no means a section of the Act of Parliament, which is at all artificially, or skillfully, or even in common technical drawing, expressed. There are several instances of this through the whole—for example, “wilful corruption.” Did ever any man hear of corruption which was not wilful? You cannot be guilty of corruption without knowing it, or without intending it, otherwise it ceases to be corruption. Wilful corruption, therefore, means simply corruption; and the use of this word “wilful” is extremely slovenly, or at least I should be disposed to call it slovenly if I had seen

it in the composition of any other penman than the Legislature, the composition of which one is bound to treat with the greatest possible respect. But it is not technically penned in other respects. It then says, "wilful oppression." The word "wilful" applies also to oppression, and it is just as correct in the one case as in the other. It is no more absurd to say "wilful oppression" than "wilful corruption;" and a party who uses the term wilful oppression, may be justified in using the term wilful corruption, as one expression is not more absurd or untechnical than the other. We have to deal, therefore, with a section where there is no very nice regard, in this first branch of it, to technical language. But in the second branch there is an equal departure from strict form of expression, because in that material part which relates to the plea it is given thus: that the defender in such action or process may produce this act, and plead that the said things were done (as if they were to plead after they had produced the act in evidence) "by authority and in virtue thereof." The first part uses another form of expression; it says, "any thing done in execution of this act,"—and yet it is perfectly clear that this latter part, "by authority and in virtue thereof," is meant to bear reference to the former part, and to enable them to plead that the thing was done "in execution of this act." Now, supposing a person in his plea were to say, I went upon the act, and I aver, that what I did was done under that act, or done according to the powers of that act, or in execution of the act—would that not be sufficient for the purpose of pleading, "by authority and in virtue thereof?" But the appellants contend for a strict and rigid construction of the act; and if we were to go

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on that principle it would not be sufficient to plead the act, and that what was complained of was done according to the provisions of the act, or done in such manner as to be justified by the act, because, according to this construction, the party must plead that it was done “by authority and in virtue of the act.” I think that this would be a very absurd nicety of construction of these words—an interpretation which common sense repudiates. Or suppose I had chosen to plead, not that the fact was done under the powers of the act, or by virtue of the act, but that it was done in execution of this act, could it be contended that I had not done sufficient to satisfy the words, and that I had not pleaded the plea which is here given, merely because I had not used those precise words, “done by authority and in virtue of the act”? I apprehend that it could not; and yet, upon what is meant by these words depends my being assoilzied from the action and obtaining the costs from the other party; because the section goes, “and if these shall appear to be so done,”—meaning, “and if these things shall appear to be so done, then and in that case the defender shall be assoilzied.” It is a condition precedent to my being assoilzied with costs, that it shall appear that what I did was done “by authority and in virtue of the act,” and that I shall have pleaded a plea to that effect; but I am sure no man will go so far in strictness of construction as to say that those words must be pleaded, otherwise I cannot recover a verdict, and shall not have the costs. Now, the way I use this argument is this,—If such strictness is not to be applied to the plea of the defender which is given in words, why should the same strictness be applied to the plea of the pursuer, which is

also given him in the body and by force of the same section? I should say, that if in the case of the defender it is sufficient to plead that which comes up to the substance, so in the other case the substance is to be regarded; and that which comes up to the substance is to be considered as being that which is required to be charged, and if charged shall be dealt with as sufficient to maintain the suit. This is a general view of the construction of the section, and of the argument from the one part to the other, which goes very far to prepare us for coming to a more minute discussion of the part of the section upon which this case depends. And now, coming to that, I confess it appears to me so clear as to leave no doubt. The case, in point of fact, is this: In the summons the words, even to the letter of the section, appear to me to be contained. There is a charge in the summons of oppression, of malicious, wilfully oppressive, and unwarrantable proceedings; and in one place they are said to be grossly illegal, — illegal and wilfully oppressive, dictated by malice or arising out of the most gross and culpable negligence. But it is said that this is in the alternative, and that it is followed out in only one or another branch; and that the pursuer must say, that the defender's conduct was either grossly and culpably negligent, or that it was wilfully oppressive, or that it was malicious, and then bring forward his facts upon which he relies. But in various other parts we have it without the alternative, and though they are in form prefaced, "inasmuch as," yet they must be taken to be substantial averments. I have therefore no doubt that the summons uses those words, and uses even those terms, "wilfully oppressive," which, according to the most rigorous construction under the 134th section, is

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sufficient. But then it is said, (and upon that the whole question arises,) that though it is used in the summons, it is dropped in the condescence. If you require the words wilful corruption, or wilful oppression, or culpable negligence, to be used, and if you hold that no words shall be sufficient as equipollents, I agree that the words are not used; but I am sure that the words used come as near to those contended for as it is possible to come to any one object without actually touching it; for after setting forth, under seventeen heads, various facts, amounting each of them to somewhat of an oppressive proceeding, it says, "Before his confinement he was enabled, by means of his earnings, to support a wife and family, but since then he has been thrown entirely out of employment, and has no means of support. In addition to his loss of health, he had also suffered in his character and feelings from the above cruel and injurious treatment." Now, I think it is going to the very outside of rigour in construction, and almost refinement, to say, that if you are required to charge, as the condition of maintaining your action, oppression, wilful corruption, or culpable negligence, and if you do charge cruel and injurious treatment, it shall not be held equal to charging oppression. Equivalent it is certainly; for I cannot agree with the argument of the learned Attorney General, who held that "cruel" was a word of equivocal import. He said that the operation of a surgeon for the sake of saving your life, or relieving you from a long endurance of pain when you are tortured with the stone, and want to be saved a life of thirty years of agony, putting you to very great pain for thirty seconds that you may be relieved the rest of your life, may be characterized as a cruel

operation. I think, in common parlance, it would not be called cruel. Cruel means unjustifiable pain,—putting you to pain for the purpose of putting you to pain, to please the person who inflicts the pain, or for the mere pleasure of giving you pain; but that which is done for your own good cannot in any way be called cruel. I hold cruelty, therefore, to be an unequivocal expression, and to mean that which is tantamount to oppression, and that the allegation of cruel and injurious treatment in the condescence amounts to a charge of wilful oppression. If so, then there is in the second branch of the case, as well as upon the general construction, a substantial charge according to the act, and the judgment below is supported. But I shall now suppose that it is to be construed more rigorously,—that no equipollents will do,—that it will not do merely to state facts which amount to oppression, but that you must charge the words “wilful oppression.” Now the question is, has not the exigency of the section been complied with by the statement of the summons, or is it necessary that it must be repeated in the condescence? I am clearly of opinion that it is not necessary that it should be repeated in the condescence, but that it is well charged under the authority of this section if it is so charged in the summons. It is very material to consider how the section puts it. It does not say at what stage of the cause the charge shall be made; it is sufficient that the charge shall be made. It does not say when. But if I were called upon to say, from the words of the section, whether it would be more complying with the requisition of the section, that it should be charged in the early stage, or at a later stage, I have no doubt that it is better and safer for the party,

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if he is only to charge it once, that he should do it in the summons rather than in the condescendence; and my reason is this, that the words are, that no action shall be *commenced*.—It does not say that no action shall be maintained or prosecuted or continued or carried on, but it says, that no action shall be “commenced” for any thing done, unless wilful oppression shall be charged. Now, is it not a most natural inference, when the legislature has not told you where it is to be charged or when it is to be charged, to infer that the legislature, in using the word “commence,” intended that the charge should be as near the beginning of the proceedings, and as near that which forms the first stage and is the foundation of the whole, as may be possible? and consequently, that it should be rather in the summons, which is the commencement of the whole, than that it should be deferred to a later period. I am therefore of opinion, that these words indicate that it should be made in the summons rather than in the condescendence. To be sure, the condescendence may be so framed as to make the charge in the summons nugatory. The summons is the writ which brings the party into Court, and calls the attention of the Judge and of the opposite party to the claim of the pursuer. The condescendence has another kind of office altogether: it is for the purpose of setting forth the particular facts which the party who has brought the suit is ready to prove, in support of the summons, and to maintain the conclusions of that summons. Now, if the condescendence,—which, by the terms of the Act of Parliament, as is justly stated by the Lord President in the case of Ross and Hunter, is required to state the whole facts which the pursuer offers to prove—if it leaves out a material fact—if it drops

those facts which are necessary to support the summons—it is clear that there has not only been a departure from the summons, but a total shortcoming of the case, and the party may be said to be out of Court on his own showing; for he having pretended that he had a case of this description in the summons, when he comes to condescend on the facts which he is prepared to prove it turns out that the facts alleged do not support the case in the summons. Therefore, I agree perfectly in the argument which has been maintained, and which is also the ground of some of the decisions referred to on the part of the appellant, both in this House and below, that the condescence may be so defective or depart so widely from the summons, as to frustrate the whole proceeding on the part of the pursuer. But if all that the condescence is defective in be, that it does not reiterate the words “wilful oppression,” while at the same time it sets forth facts which amount in themselves to that which forms the foundation of the summons, and which will bear out the summons in charging wilful oppression, I think it is a very gross absurdity to say that the summons and the condescence may not be taken together, and that upon the two together you may not have such a charge as the section requires to support an action, or rather to commence an action, for wilful oppression. Now, with this view, let us look at the cases. The earliest case we have appears to have been the subject of grave deliberation, I mean the case of Forteith, which was made the subject of very great discussion at the bar, and of some of the most elaborate and able judgments that I have ever seen in that or in any other Court. That case did not proceed upon a view of the statutory requisition as to the pleading,

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but it went upon the kind of view which I am now taking of the condescence and the summons as applicable to the common law position, namely, this,—the summons charged malice, or was supposed to charge malice, but the condescence stated facts in proof of malice, which might, according to the view you took of them, either prove malice or no malice at all; for it was said that it was done, either for this purpose, which would be malicious, or for that purpose, which would not be malicious at all and would not support the summons. Then, said the Court, as you have chosen to put it in two ways, and have not said that it was maliciously done, this condescence is not sufficient; but had you excluded that which makes your charge equivocal, and confined yourself to that which would have been explicit, or had you added that which would have made your equivocal statement unequivocal, then we should have held that that was sufficient. That was a very singular case in more respects than one. It is a very extraordinary doctrine, to hold that a party is liable in such a case as that to an action of damages. However, it appears to be the law (though cases are scanty upon the subject, and I doubt whether cases can be found in which damages have been recovered) that a party instructing his counsel to make an allegation in the course of his written pleadings or of his parole argument, to represent his adversary in an unfavourable light, may be sued as a libeller and slanderer, and as a wilful wrongdoer, for having instructed his counsel to state what his counsel says in Court against the opposite party. That is certainly a most extraordinary doctrine. I will not say that it is without precedent and without analogy, but it certainly is a doctrine in support of which, prac-

tically, I think that very few, if any, cases in any country are to be found. Then comes the case of *Ross v. Hunter*. In that case the material fact, without which neither the summons nor the condescendence could stand,—namely, the knowledge of the bankrupt's insolvency, and the date of the deed which was in question,—was not stated in the condescendence; and there the Court said, you cannot go back to the summons, because you ought to have stated it in the condescendence, inasmuch as the condescendence must contain the whole of the material facts. The other case was one in which I moved your Lordships to decide,—the case of *Luke v. the Magistrates of Edinburgh*. I had not seen the report before, and I do not object to the form in which I now see it for the first time. There the most material fact of the whole was this: the case turned, in one of its most material branches, upon the notice or summons having been given to the magistrates; that was omitted in the condescendence. Whether it was in the summons or not, I do not recollect, but it was attempted to call in aid the pleas of law, and it was said, you cannot call in aid the pleas of law; because the office of the pleas of law is to set forth a note of those conclusions in point of law, or those arguments in point of law, which are raised upon the fact stated in the condescendence; and accordingly you cannot, when you are out of Court, as far as regards the averment of facts, supply them by any new statement of facts in the pleas of law. When you look at the statement in that case, the more you look to it the more you will be disposed to adopt this conclusion; you will find that it wholly proceeds upon the distinction I have now made. We are now upon a perfectly different question, whether a section of an Act of Parlia-

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ment, which requires wilful oppression to be charged, is complied with, even to the letter; for I go so far as to say, that the action shall not be commenced unless wilful oppression be charged. But in the present case wilful oppression is in terms charged in the commencement of the action. It is charged in the summons, and there is no departure from it in the condescendence; on the contrary, the condescendence sets forth facts, which facts in themselves not only do not negative the charge of wilful oppression in the summons, but all more or less tend to support it. It is for the Court and jury, in the ulterior stage of the cause, to say whether they do so in truth or not. Upon these grounds, I have no doubt that the case has been well decided in the Court below, and I shall move your Lordships to affirm the judgment of the Court below, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondent the sum of 200*l.* for his costs in respect of the said appeal.

RICHARDSON and CONNELL.—JOHNSTON and  
 FARQUHAR, Solicitors.

[8th July 1834.]

WILLIAM FORBES, Appellant.

ALEXANDER LEARMONTH LIVINGSTON, Respondent. No. 18.

*Property—Run-rig.*—Question as to the rights of parties in mines and minerals where lands are held in run-rig.

FORBES of Callander raised an action against 2D DIVISION.  
Livingston of Parkhall, setting forth “ that the Ld. Mackenzie.  
“ Earls of Linlithgow and Callendar, formerly pro-  
“ prietors of the barony of Almond, did at different  
“ periods grant several feu rights to various persons,  
“ inter alia, of the following lands, part of the said  
“ barony, viz. all and whole the towns and lands of  
“ Manuelrig, with houses, biggings, &c., excepting  
“ and reserving always to the said Earls, their heirs  
“ and successors, superiors of the said lands, the pri-  
“ vilege and liberty of digging and winning coal and  
“ coalheughs in any part of the lands above men-  
“ tioned lying as aforesaid, conform to use and wont:”  
that the pursuer had acquired right thereto, and that  
Manuelrig embraced certain specific lands. “ That in the  
“ year 1724 Alexander Mitchell of Mitchell, writer to  
“ our signet, acquired right to the feu of the said lands  
“ of Manuelrig with the pertinents, and the same now  
“ pertains and belongs to Alexander Learmonth Living-

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“ ston, esquire, of Parkhall. That notwithstanding that  
 “ the said lands of Manuelrig with the pertinents are  
 “ held of the pursuer under an express reservation of  
 “ the coal in the same, the pursuer is informed that  
 “ for some time past coal has been wrought out of the  
 “ lands aforesaid, and sold, used, or disposed of, without  
 “ his authority or consent, and the said Alexander  
 “ Learmonth Livingston, the present proprietor of the  
 “ said lands, refuses to desist from working the said  
 “ coal although required by the pursuer so to do.”  
 He therefore concluded “ that it ought and should be  
 “ also found and declared by decret foresaid, that the  
 “ pursuer, his heirs and successors, have the only good  
 “ and undoubted right and title to the whole coal in  
 “ the foresaid lands of Manuelrig, containing and com-  
 “ prehending as aforesaid part of the said lands and  
 “ barony of Almond or Haining, and to dig, win, and  
 “ carry away the said coal conform to use and wont;  
 “ and further, that the said Alexander Learmonth  
 “ Livingston, his heirs and successors, have no right  
 “ or title to the said coal; and the same being so found  
 “ and declared, the said Alexander Learmonth Living-  
 “ ston, his heirs and successors, ought and should be  
 “ decerned and ordained instantly to desist and cease  
 “ from working, using, or disposing of the said coal in  
 “ any manner of way in all time coming.” Livingston  
 denied that the lands libelled formed part of Manuelrig,  
 and raised a counter action with declaratory conclusions  
 to the effect of having it found that Forbes had not right  
 to the coal in these lands. The actions were conjoined,  
 and a record made up; and the plea in law maintained  
 by Forbes was, that the lands “ lie run-rig, and conse-  
 “ quently one half of the coal of the whole lands is

“ Mr. Forbes’s property.” On the other hand it was pleaded by Livingston “ that this was a new view of his claim, and that even if the lands did lie run-rig it does not follow in point of law that Mr. Forbes is entitled to judgment in his favour upon any of the conclusions to any extent.” Lord Mackenzie pronounced this interlocutor:—“ Finds that the lands to the coal of which the present conjoined actions relate form part of the lands of Manuelrig: finds that the lands of Manuelrig consist of two portions, viz., Manuelrig, being part of the barony of Manuel-fowlis, and Manuelrig, being part of the barony of Haining: finds that the pursuer has right under the reservation libelled by him to the coal of the latter portion of lands, and that he has not right to the coal of the former portion, which belongs to the defender: finds that the portions appear to have been possessed in run-rig, and at any rate have been so intermingled that it is not possible now to determine the boundaries of them: therefore finds, that the coal under the whole lands of Manuelrig must be held to belong to the pursuer (under the said reservation) and to the defender in common property, each having a share proportionate to the extent of the lands to the coal of which, if the boundaries were known, each would have right: finds, in defect of evidence to the contrary, the extent of these lands must be held to have been equal, and finds no evidence sufficient to show the contrary; but that in all the circumstances of the case it appears most likely that the two portions were of equal extent: therefore finds, that the coal of the lands libelled belongs to the extent of one half in common property to the said

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“ pursuer ; and prohibits and interdicts the said de-  
 fender from working it in future without his consent :  
 “ finds the defender liable to account to the pursuer  
 “ for one half of the clear profit drawn by him from  
 “ working the same since the raising of this action by  
 “ the said pursuer ; and decerns accordingly.” Living-  
 ston reclaimed, and maintained that the interlocutor was  
 not warranted by the conclusions of the summons. The  
 Court sustained this objection, and therefore recalled  
 the interlocutor.

Forbes appealed.

The LORD CHANCELLOR, in the course and at the con-  
 clusion of the argument, made these observations.—Is  
 there any instance of the principle of run-rig being ap-  
 plied to minerals? Run-rig I understand to mean furrow  
 by furrow, that is, a certain narrow space. But how is  
 that to be applied to coals and minerals? how can you  
 ascertain what is under the adversary’s furrows, and  
 what is under your furrows? When these divisions  
 into rigs were made the minerals were not at all  
 thought of. How can it be done, unless by rigs  
 you mean large fields? But this I understand means  
 only so many yards. The Lord Ordinary appears to  
 assume, that the moment that it is proved that the sur-  
 face of the land is run-rig the land under the surface is  
 of another species of tenure; that it is of one descrip-  
 tion of tenure quoad the surface, and of another under-  
 neath it. The holding of run-rig on the surface is  
 perfectly intelligible; it is just as much a tenure in  
 severalty as if it were a separate enclosure; it is not  
 held in common in the least degree. Then I do not see

how the surface of the land can be held in severalty in run-rig, but the bowels of the earth held by another tenure, namely, tenantry in common.

This is not an immaterial question, for if it is answered in the affirmative it completely disposes of the interlocutor; and I have felt throughout, that if it is once ascertained that the idea of run-rig land is not of necessity accompanied with equality, that completely destroys the finding, for the finding is that there is an equality in each of those persons. This is declared to be not a holding in common, but in severalty. If there is a holding in common each of the persons having an interest has a right throughout the close with others equally interested, but that is not the case as to these rigs.

I would move your Lordships that the judgment in this case be postponed, as I wish to have an opportunity of looking farther into it. It appears to me, that it is impossible to uphold the Lord Ordinary's interlocutor; but the learned judges of the Court of Session have given us very scanty materials on which to proceed in judging of the grounds of their opinion. But I will take an opportunity of considering the matter further before I advise your Lordships on the judgment to be pronounced.

Adjourned.

His Lordship afterwards moved, and the House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the several interlocutors, so far as therein complained of, be and the same are hereby affirmed.

SPOTTISWOODE and ROBERTSON—RICHARDSON and  
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No. 19. JAMES HAMILTON, Appellant.—*Attorney General*  
(*Campbell*)—*Lord Advocate* (*Jeffrey*).

MISS MARGARET LITTLEJOHN, Respondent. —  
*Dr. Lushington*—*Murray*.

*Trust—Right in Security—Competition.*—A party granted heritable bonds over his estate, and thereafter executed a trust deed for behoof of his creditors, reserving to himself a certain annuity, and providing that the trust should not cease on the death or resignation of the trustee, and pointing out the manner in which a new one should be chosen; and the creditors acceded to it:—Held (reversing the judgment of the Court below), that, although the trustee was dead, an heritable creditor was barred from applying for sequestration of the rents.

2D DIVISION.

IN the year 1810 Hamilton (the appellant) purchased the estate of Kames from the trustees of the Honourable William Macleod Bannatyne. He paid a portion of the price, but allowed the remainder, viz. 20,000*l.*, to remain a real burden upon the lands; and, in security of that sum, granted certain bonds of corroboration in favour of the trustees. One of these bonds was for a sum of 10,000*l.*, of which, to the extent of 667*l.* 10*s.*, the trustees, in October 1815, granted an assignation to Mr. Michael Linning, writer to the signet, who was infest in the lands, and who afterwards, on the 19th of

November 1818, transferred the debt and corresponding security to Mr. Peter Littlejohn, the respondent's brother, who also took infestment. On Littlejohn's death, the right to one half of the debt thus vested in him opened to Miss Littlejohn (the respondent) as one of two heirs portioners; and she, having made up titles to the same, became an heritable creditor on the estate of Kames to that extent. Hamilton having afterwards become insolvent, it was arranged among his creditors that a trust should be executed by him, conveying his whole property to trustees for their behoof. A trust deed was accordingly executed in favour of Mr. John Campbell quartus, W. S., or such person as he might assume; whom failing, such person as the creditors might appoint. Its objects were declared to be, 1st, for payment of the expense of management and public burdens affecting the estate; 2dly, an annuity of 600*l.* to Hamilton during life; and, 3dly, for payment of the creditors according to their respective rights and preferences. It contained a clause, declaring that, notwithstanding the death or resignation of the trustee in possession before the purposes of the trust should have been fully executed, the trust should not become void, but should stand and subsist as a security to the creditors; to whom, notwithstanding such decease, a power was given, if they should think proper to execute it, of reviving and keeping alive the trust, by choosing, from time to time, such trustee or trustees as they should think proper. A deed of accession was soon thereafter executed by the creditors, and, among others, by Linning, in which they bound themselves, and those who might thereafter have right to their respective debts, to conform to the trust deed; and they cove-

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wanted not to raise or follow forth any separate action or execution for their debts during the subsistence of the trust. Mr. Campbell took infestment under the trust deed, and entered upon the duties of the trust; but he soon after renounced the office, and was succeeded by Mr. Wright, who continued to act as trustee until May 1824, when he died without having assumed any person as his co-trustee. The estate remained unsold. No new trustee was elected in Mr. Wright's place; but, for some time after his death, Mr. M'Crae, who resided on the spot, was employed to uplift the rents for behoof of the creditors. This, however, it was alleged, was done very irregularly, and the affairs of the estate were in consequence in a ruinous condition.

In 1830 Mr. Smith, a creditor, raised an action of mails and duties, and applied for sequestration of the estate, which was opposed by Hamilton in respect of the trust; and the Court, on the 10th of July of that year, refused the petition.\*

Thereafter, in 1832, Miss Littlejohn resolved to pursue a process of ranking and sale of the estate, and with that view raised an action of mails and duties against the tenants, and similar actions were raised by other creditors who had acceded to the trust. She thereupon presented a petition praying for sequestration of the estate, and the appointment of a judicial factor, with the usual powers. This application was resisted by Hamilton, principally on the grounds:—1st. That it was incompetent, in respect that the Court had refused a similar petition by Smith. 2d. That the trust created

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\* See 8 S. & D., 1063.

by the deed of 1815 was still subsisting; that it had been expressly acceded to and confirmed by the respondent's author; that she herself had acted under that trust, and homologated it many times; and that, in virtue of that deed, there were certain persons in possession of the estate, whose rights could not be summarily superseded by a sequestration: 3d. That the application was barred by the terms of the deed of accession, under which the acceding creditors (among whom was the respondent's author) bound themselves not to follow forth any separate suit or diligence against the estate: 4th. That her author, and the respondent herself, were parties to the appointment of Mr. M'Crae as factor, and that she, therefore, had no right to defeat the arrangement then entered into by the heritable creditors for their general and joint benefit: And, 5th, That it was unjust that he should be deprived of his interest under the trust deed, viz. the stipulated annuity of 600*l.*, by a combination among the creditors to defeat the trust.

The Court, on the 15th of December 1832, pronounced this interlocutor:—

“ The Lords having resumed consideration of this  
 “ petition, and heard counsel, sequester the rents of  
 “ the estate of Kames, as craved in the prayer of the  
 “ petition; appoint Robert Thom, cotton spinner at  
 “ Rothsay, to be factor under the sequestration, with  
 “ the usual powers, and with power to receive the by-  
 “ gone rents of the estate; he finding security in terms  
 “ of the act of sederunt.”

Hamilton appealed.

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*Appellant.*—The trust deed, and the deed of accession form a contract, not only between the appellant and his creditors, but between the creditors themselves, from which none of the parties are entitled to resale. There is at this moment a subsisting trust, and a subsisting accession to that trust; and the obligation incumbent on the respondent to conform thereto is established by many acts of homologation. Much slighter acts of homologation than those of the respondent are sufficient to constitute a constructive accession.\* Were this one of those constructive cases, the respondent would be bound by the acts and deeds of her author, as well as her own acts and deeds, to conform to this trust. She and her author have both taken under it, and derived large benefits from it. They exercised the powers of electing trustees under it. They, as well as the whole other creditors, acted under this trust till recently; and it is only now, with a view of defeating the appellant's preferable annuity, that they attempt to set it at defiance. But, further than this, the respondent is expressly barred by positive obligation from instituting any "action, suit, diligence, or execution" whatever against the appellant or his estate.

Besides, the application was not made under such circumstances as can alone legally warrant sequestration of a landed estate or the rents thereof. Sequestration is a severe and oppressive diligence, and will not be permitted to be resorted to by creditors, or granted by a court of law, but under very special cir-

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\* *M'Vicar against Creditors of Baillie*, 18th Feb. 1762 (2 Bell Com., 499); *Heriot against Farquharson*, 27th June 1766, Mor. 12404; *Trustees of Croll against Robertson*, 7th May 1791, Mor. 12404; *Borthwick against Shepherd*, 13th Nov. 1832, 11 S. & D., 1.

cumstances. It is a judicial transmission of property from the existing owner to the creditors; and it is incompetent to award it, without descending into an inquiry as to the foundation of the debt, and without the subject being brought before the Court by the perfected diligence of creditors.\* Here no inquiry whatever has been made concerning the foundation and extent of the claims, nor is the estate attached by the diligence of any creditor, so as to have warranted such a proceeding; for the only action in Court is a petitory action by the respondent, whose claim of debt is denied, and that action resisted; and the defences for the appellant being not yet either finally sustained or repelled, it remains yet to be seen whether the respondent is well founded or not.

There is nothing, therefore, in this case to found a jurisdiction in the Court of Session to interfere in the management of the estate, or make a judicial appointment for that purpose. The estate is at this moment in the creditors, by special conveyance for special purposes. They are infest in the property, under the conditions of the trust; and they have not only the power, but it is their duty, upon the resignation or death of any trustee, to appoint another to carry into effect the purposes for which the trust was created. Their not choosing to do so can neither give them the right to call upon the Court to do so for them, nor render it competent for the Court to interfere.†

*Respondent.*—The estate being insolvent, and the subject of the competing diligences of real creditors, it was competent for the Court of Session to award the

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\* Erskine, b. ii. tit. 12. sec. 56. † Erskine, b. ii. tit. 12. sec. 55.

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sequestration, and appoint a judicial factor for collecting the rents and managing the property, and under existing circumstances, was not only expedient for the interests of all concerned, but absolutely necessary for the preservation of the rents, there being no one in possession of the estate, or legally entitled to collect the rents.\*

It does not prejudice or affect the rights of the appellant, or of any other parties to these rents, whether under the trust deed, or any other titles or securities. It merely preserves the rents for the benefit of those who ultimately may be found to have the best right to them.

Neither is the respondent barred from applying for a sequestration by the trust deed, or the deed of accession. Though the trust deed may still exist, the trust itself does not; for there has been no trustee since 1824, and, confessedly, there is now no person in possession of the estate. Again, the obligation entered into by the creditors in the deed of accession, not to follow forth any separate suit or diligence against the estate, is expressly limited by the words, “during the subsistence of the trust.” As the trust does not subsist, this obligation is of course annulled.†

LORD CHANCELLOR. — My Lords, in considering this case I feel myself under considerable difficulty in coming to the same conclusion that the Court has done,

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\* 48 G. 3. cap. 151. Erskine, b. ii. tit. 12. sec. 56; Graham v. Fraser, 13th Feb. 1745, Mor. 14345; Smith v. Hamilton, 10th July 1830, 8 S., D., & B., p. 1063.

† Stair, b. iv. tit. 1. sec. 27; Ersk. b. ii. tit. 12. sec. 55; Dict. voce Sequestr. passim; Paterson v. Anderson, 16th Nov. 1764, Mor. 14346; Bank of Scotland v. Ogilvie's Trustees, 13th Feb. 1829; 7 S. & D., p. 412.

in ordering the sequestration; and the difficulty is not merely that which arises out of the situation in which the parties have voluntarily placed themselves, for I regard Miss Littlejohn, who has obtained the sequestration, to be the same as Mr. Linning, one of the parties to the trust deed; but that difficulty is not in a small degree, but materially, increased in my mind by the course adopted by the Court of Session almost upon the same claim, brought forward by another party, but bottomed upon the same security, namely, the deed assigned by Mr. Linning, first to Mr. Smith, who was the party thus applying, and now assigned to Miss Littlejohn, who upon that did make an application, and which application, in the second instance, succeeded—that event being contrary to the first. This difficulty compels me to look, in the first place, at the situation in which the parties placed themselves by the trust deed of 1815, and, in the next place, to look at the circumstances that may be supposed to distinguish these two cases that were attended by such opposite results. Now, not to go through the details which have already occupied your Lordships consideration, given by one of the parties, namely, the present appellant, it is sufficient to look at the obligations incurred by the opposite contracting parties to the trust deed. During the whole of the trust deed its aspect is that of a substitution of a trust management and administration for a judicial factor, management, and administration,—the preference to the former over the latter being clear, and, no doubt, being open to the parties. It is a common preference given by both parties, the debtor and creditor, to the one over the other mode of management, and an exclusion, I

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should say by that preference, acted upon and agreed to by the parties pro tanto of the other mode of management or administration. Is there any thing unintelligible in parties having both courses open to them, taking the one rather than the other? Are they of the same nature? No. Are they attended with similar incidents? Certainly not. Do they, above all, impose the same burthens upon the parties, or rather upon the estate? For that must be taken to be the common object of care to both parties,—first with the creditors, to co-operate their security, and for the debtor, with the same common interest as the others, charged with the same trust as the creditors, and interested in the surplus, if any, and in the meantime in his allowance out of the rents and profits. It is most material to consider, with a view to those interests, the reduction of price in managing the estate; for as to the management of an estate, I take it to be quite clear that a trust is preferable to a judicial administration, as being, upon the whole, more economical. Every body must have known cases where this comparison fails,—where the advantage was equal; or cases may occur where the balance was in favour of the judicial over private management,—where, as in England, the receiver has a poundage, and a trustee is not allowed any thing. In Scotland the case is different. Consequently the comparison is not so absolutely and necessarily in favour, in point of economy, of a trust management, as compared with a judicial, in Scotland, that it would be in England. But still, in the majority of cases, I apprehend it may be safely said that that circumstance exists, to give a preference to the one

over the other. But that is not necessary to my argument; for I may be said to be arguing it when I am exposing the difficulties. It is not necessary to say that the one mode of management is of necessity cheaper or preferable to the other: suffice it to say, that the parties have agreed upon one mode, and have chosen it; for what reason I care not,—it is quite immaterial. I can see why they should do so, which is quite enough, though Mr. Murray argued,—and his authority is very great upon any such question certainly,—that even if it were not more advantageous, as he said, to the estate, the judicial course should be taken in preference to the private management. But says Mr. Hamilton, you are the parties contracting with me; the question is, how have we bound ourselves? what have I given up? and what obligation have you incurred towards me? That is the question; and then will arise the next question: has the proceeding taken violated those obligations on the part of the creditors, and frustrated that stipulation that Mr. Hamilton had agreed for? It seems to me unnecessary to go much further, to satisfy your Lordships that there is ground for any great doubt and difficulty. And further, “We do hereby agree, covenant, and oblige ourselves,” say the creditors, says Mr. Linning, says Miss Littlejohn, —I am bound to read it so in this instance;—I bind and oblige myself that I shall not “raise, commence, or follow forth any action, suit, diligence, or execution for arresting, attaching, or seizing the person of the said James Hamilton, or the estate, subjects, sums, debts, and effects belonging to him, during the subsistence of the trust:” Suppose the words were, whereby the estate may be affected,—or some such

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words. Now, Miss Littlejohn, after having contracted such an obligation, with her eyes open, towards Mr. Hamilton, and Mr. Hamilton acting under it; for it is quite consideration enough to bind her, that Mr. Hamilton executed this deed, and gave up the estate that would not otherwise have been subject to his diligence, or not in that form; certainly he gave up these estates, over which there was no heritable security riding, and then executed the instrument I have read to your Lordships. Now, is it or is it not consistent with the obligation she incurred, that she should proceed by the way of this summary petition, before the Court of Session, for a sequestration and the appointment of a judicial factor? My Lords, in the first place, can it be denied that it is a suit? It is a short and summary suit; but it is a suit upon which execution follows, and confiscation; and it proceeds immediately to change the possession. It takes the possession out of the trustee who was in it by the deed, and clothed with the legal estate by that deed, and transfers it to the officer of the Court. That is all done. Mr. Thom may be a very excellent factor to manage the estate, and, for aught I know, it may be better for Mr. Hamilton and the estate, rather than a successor should be named to Mr. Wright;—but that is not what we are upon. The question is, whether a party, appointed in the way marked out by the instrument, shall be named? and it is in vain to tell Mr. Hamilton it is better for him. He says, I stand upon my own rights; you bargain not to sue me, and I insist upon this being a suit, and that argument is all but irresistible,—I should say irresistible, but for the authority of the Court below; and, as I said in the course of the argument, supposing

an undertaking is given by a party not to sue another, and he brings his action, there is not a Court in this country, or in Scotland, that will not make him pay all the costs in that action, brought in the teeth of the undertaking, and stay the proceedings. It is not sufficient to say that Miss Littlejohn cannot get the benefit of the trust deed; that is not the fault of Mr. Hamilton, it is the fault of her co-trustees, who do not revive the trust in a person appointed according to the provisions of the trust deed. Has not Mr. Hamilton a right to say that they first bound themselves not to sue; that is enough. What has occurred since he has had no concern in. He must not be damnified by any thing that they have done, or omitted to do, for their own benefit, letting the trust expire, or letting the machinery go out of use, when they would have put it in repair, unless you show that he has done something by which he has broken the bargain that would put it upon a different footing. It is said this is a summary proceeding, and little evidence is required. That is no reason for going without evidence; it is a petition with answers, upon which the Court makes a deliverance; but it is material as to the rights of the parties. It begins with what the Court looks to mainly: it changes the possession from the trustee to the factor. It is then said, that the trust may go on notwithstanding this. I confess myself not to be very well able to understand that; for if a factor is appointed under the Court, *cadit questio*, the trustee is displaced, and a new mode of administration is substituted by a judicial factor under the Court of Session, and that Court of Session might be an object of terror to the parties,—the terror of whose interposition might

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be the ground for joining in this trust deed; and then that Court is let in, against whose intervention I am entitled to say that the trust deed was mainly framed.

Now, some such reasons as these must, I should apprehend, have mainly influenced the Court of Session in the other case; and I can well understand why that other case was disposed of in an opposite manner to this, and in the way we know it to have been. That case forms the second ground of my objection to the present proceeding, and I see not how it is possible for the two deliverances of the Court upon these two petitions to stand; but I wish to see more of the proceedings in that case, in order that I may be able to trace the differences between the two, and whether they can stand together. I should like to be furnished with the particulars of Smith and Hamilton. I know there were actions of mails and duties, and a petition similar to the present; but I wish to see the statement in that petition, and the answers, and I shall beg permission of your Lordships to let this case stand over, that I may see those petitions and answers. It appears to me that the present case was hastily or rapidly disposed of. I see no great traces of consideration; and it was probably thought, being in the simple and summary form of a petition, that the parties had no great interest either way, and it was thought that the Court might prevent the wasting of the assets, by appointing a judicial factor. I apprehend that will be found to be the case. I wish this case to stand over till I see those documents; but if I should find that those documents make a little difference between the two, I shall still feel pressed by the ground of objection, that this is a bargain and stipulation made. And how is a party to be secured by

becoming a party to a trust deed, if it is to be thus set aside? Trust deeds are to be encouraged, and not discouraged; they have been too much discouraged in England. These obligations have not sufficient force and effect, just as arbitrations have not had their full force and effect, either in equity or in law, in this country; but in Scotland it is not the same. They have not such a dread of ousting the jurisdiction of the Court, as it is called, that we have; but we have gone to a greater extent, and say that no man with his eyes open shall make a deed whereby he may submit to arbitration, and thereby oust the jurisdiction of a court of law; for no penalty shall be enforced at law, or enforced at all, however deliberately they may have bound themselves. To that extent, I would almost say excess, of nicety in Scotland they have not gone. These trust deeds are to be encouraged—they are the objects of favour—they are cheap and beneficial in many instances to the parties—they tend towards the saving of expense to the estate; and I do not see how, if this decision stands, that any person will be able, with confidence in the result of its operation, to bind himself and take an obligation from others, in the manner of the trust deed of 1815; because it may then be said, the instant any one chooses to change his mind, he is not only to do it when the object of the trust allows you to go to the Court of Session, but the Court will proceed upon the supposition there is an end of the obligation. Last of all, it is said, Oh, there is a competition of creditors in the actions for maills and duties; and I find the actions for maills and duties stated in the petition, and not stringently denied in the answers, and I must assume, upon this summary proceeding, the

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fact is so. That being the case, that leads me to observe that these actions of maills and duties are brought by persons who stand in *pari causâ* with Miss Littlejohn, —they are creditors; they are brought against Mr. Hamilton or his estate, but it turns out they are brought against both; they are nominally against Mr. Hamilton, which the parties are bound not to do, though they are really brought against the tenants of the estate, and the rents and profits, which the parties are also bound not to do. They themselves undertook not to bring actions; and then they go into court and bring actions of maills and duties. And what do they do upon that? They claim to have the power to set aside the private, and substitute for it the judicial management; that is to say, four or five of the creditors break their bargain with Mr. Hamilton,—they ride through the obligation in the bond of 1815, by bringing actions, after binding themselves to bring no actions; and then, they having committed one breach of the obligation, Miss Littlejohn and Mr. Smith commit a number of others; and their argument for their sequestration, which is contrary to their obligation incurred in 1815, is, True it is I have done so, and true it is that the Court of Session, when this very bond of mine, in Mr. Smith's case, was held not to be a ground for granting a sequestration in the case of Mr. Hamilton, nevertheless held I had a right to it, because at that time I was the only person who had violated the obligation; but now five others have violated it. Was any thing ever heard more contrary to all principle, and inconsistent with itself? And this last answer of mine gets rid of the repeated question put, whether there was an essential difference in *Smith v. Hamilton*, and

Littlejohn v. Hamilton. The answer was, there were actions for maills and duties,—that is saying there was a breach of the obligation ; and now there are five other breaches of the obligation. As at present advised, I cannot recommend your Lordships to allow that this interlocutor should stand. Further consideration may throw new light upon the subject. I shall give it my best attention ; and if the result of it should be, that I am impressed with a different view of the case, I shall state it to your Lordships. It will be unnecessary that I should trouble your Lordships any further, in any view of it. If I should be in favour of a reversal, I have given my reasons for it ; and if I should be of opinion to affirm the interlocutor, the usage of your Lordships House dispenses with the necessity of giving any reasons, unless I should be able to answer the arguments I have advanced ; and unless I can find that answer, I do not think that the judgment below can stand.

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Adjourned.

LORD CHANCELLOR.—My Lords, I stated at great length, when this cause was before your Lordships, the reasons why I could not agree with the decision of the Court of Session. I entered at length upon those grounds ; I have since reconsidered it, and have had the communication from Scotland, which I promised to have, for the purpose of enabling me to alter my opinion, if it was unfounded, or to confirm it, if it was well grounded. The result of the inquiry is entirely in favour of that opinion ; and upon the grounds, and for the reasons which were then taken down in writing in the usual way, and which, if looked to, will be



No. 19. found fully to support the judgment that was then suggested. This is a case in which, of course, no costs can be given, except if there have been costs in the Court below, those costs must be provided for.

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The House of Lords ordered and adjudged, That the interlocutors complained of in the said appeal be and the same are hereby reversed.

VIZARD and LEMAN—RICHARDSON and CONNELL,  
Solicitors.

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JAMES LAWSON, Tenant in Castle Nairne, Appellant. No. 20.

Mrs. WEDDERBURN OGILVY, of Ruthven, Respondent.

*Title to Pursue.*—A lady who was served as heiress of entail, and “only child” of her father, held (affirming the judgment of the Court of Session) to have a sufficient title to insist for payment of rent falling under the executry.

*Lease.*—It was provided by a lease that a tenant should not take two white crops, or plough up for crop any part of the farm which had not been three years in grass, and if he deviated from this rotation he should pay 10*l.* of additional rent for each acre so cropped for the last three years of the lease; and in the penult year of his lease he cropped a field which had not been three years in grass, and also cropped the same field in the last year of the lease:—Held (affirming the judgment of the Court of Session), that the tenant was liable in the additional rent for both years.

IN 1806 James Ogilvy, Esq., of Islabank, the father of the respondent, entered into missives of lease with the appellant, James Lawson, by which he let to the appellant the farms of South and North Grange, of Airly, and the farms of Parkend and Fentonhill, as all then occupied by the appellant. The lease was to endure till Whitsunday 1827, as to the houses and grass, and till the separation of the crop as to the arable land; and the rent was to be 230*l.* for the farms of South and

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North Grange, of Airly, and 15*l.* for the farms of Park-end and Fentonhill, payable at two terms, Martinmas and Whitsunday, by equal portions, after reaping each crop, besides certain kain. It was afterwards abated 7*l.* 5*s.*, making the amount of the money rent for both farms 238*l.* 0*s.* 8*d.* Both parties bound themselves to enter into a formal lease containing certain stipulations; and in 1821, after a litigation on the subject, a lease to the above effect was executed, and in which the following mode of cropping was laid down; viz.—“ The farm of  
 “ South and North Grange, divided into three parts  
 “ or divisions, two of which are the southmost and  
 “ northmost, and the third division comprehends Park-  
 “ end and Fentonhill, the southmost and northmost  
 “ divisions being each of them put into seven fields,  
 “ these two divisions shall be cropped exactly similar;  
 “ that is to say, one field the first year in clean fallow,  
 “ or drilled green crop; second year, wheat, oats, or  
 “ barley sown down with a sufficient quantity of rye-  
 “ grass, red and white clover seeds, and shall remain  
 “ in grass the three subsequent years, which grass may  
 “ be cut the first or second year, in the option of the  
 “ tenant, and shall thereafter remain in pasture until  
 “ the field or division is again ploughed up in the  
 “ rotation, and when broken up, two corn crops may  
 “ be taken, one of oats, and the other of barley; but  
 “ if the ground be not suitable for barley, both crops  
 “ may be oats, and so on regularly and yearly through-  
 “ out the other six fields; by which method of crop-  
 “ ping there will be always during the lease, and at  
 “ the expiry thereof, in each of the two divisions, one  
 “ field in clean fallow, or drilled green crop, three of  
 “ said fields in sown grass, and the other three in corn

“ crop.” It was farther declared, “ that as the several  
 “ tack duties before mentioned were stipulated only on  
 “ condition of the tenant’s adopting the rotations and  
 “ methods of cropping before specified, and adhering  
 “ strictly thereto during the lease; therefore, in case  
 “ the said James Lawson and foresaids shall at any  
 “ time during the lease deviate therefrom in any respect,  
 “ without the consent of the proprietor in writing, the  
 “ tenant shall be bound, as he hereby obliges himself,  
 “ to pay to the said James Ogilvy and his foresaids  
 “ the sum of 3*l.* sterling of additional money rent, over  
 “ and above the rent before specified for each acre, or  
 “ proportionally for any part of an acre, on which the  
 “ said deviation shall have taken place previous to  
 “ the last three years of the lease, and 10*l.* sterling  
 “ of additional yearly rent for each acre, and propor-  
 “ tionally for any part of an acre, on which the  
 “ said deviation shall have taken place for the last  
 “ three years of the tack; which additional rent shall  
 “ not be considered as penalty, but as pactional rent,  
 “ and shall be payable at the terms and along with the  
 “ money rents before stipulated.”

Mr. Ogilvie died in September 1826, and was suc-  
 ceeded by the respondent, his only child, who was infest  
 as heiress of tailzie and of line on the 5th day of November  
 1827.

In the month of October of the same year she raised,  
 with consent of her husband, an action before the  
 sheriff of Forfarshire against the appellant, setting forth  
 the terms of the lease, and in particular the above  
 clause, and averring, “ That in the year 1823 the field,  
 “ consisting of about fourteen Scots acres, lying on the  
 “ south-west of the cot-house in the middle of the farm,

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“ being the second field west of the steading, and one  
 “ of the seven fields of South Grange division before-  
 “ mentioned was sown down with grass seeds along  
 “ with the corn crop of that year; and in the following  
 “ year, viz. 1824, said field was young grass of the  
 “ first year; in 1825 it was grass of the second year;  
 “ but in 1826 the field was ploughed up and sown  
 “ with oats, instead of remaining the proper time in  
 “ grass; and in the present year, being the last,  
 “ and awaygoing crop under the tack, said field was  
 “ also under a corn crop, partly barley, but chiefly  
 “ oats, being two successive white corn crops, after  
 “ grass of two years of age; so that the said James  
 “ Lawson has incurred the pactional or additional rent  
 “ of 10*l.* sterling per acre of said field for each of  
 “ the said last two years, viz. crops and years 1826 and  
 “ 1827.” She farther averred, that the appellant was  
 owing the ordinary rent of 238*l.* for crop and year  
 1826, “ and the sum of 140*l.* sterling of additional  
 “ money rent, at the rate of 10*l.* per acre of said field  
 “ on which the deviation took place, for said crop and  
 “ year, amounting together to 378*l.* 0*s.* 8*d.* sterling,  
 “ payable the one half at Martinmas 1826, and the  
 “ other half at Whitsunday 1827; and also the like  
 “ sum of 378*l.* 0*s.* 8*d.* sterling, being the rent and ad-  
 “ ditional rent before mentioned for crop and year  
 “ 1827, payable,” &c.; and she concluded for payment  
 accordingly.

In defence it was pleaded, 1. That the respondent  
 had not stated the nature of her title to pursue. (This  
 was obviated by an amendment of the libel, in which  
 she described herself as “only child and heir of tailzie  
 “ and of line” of her father, and infest as such.) It



was then objected, 2. That the rents pursued for, which fell due at Whitsunday 1826, fell to the executor, seeing that her father died in September of that year, so that they were in bonis of him. To this it was answered, that the respondent was the "only child" of her father, and consequently both heir and executor.

3. In regard to the merits, the appellant stated, that the farms of South and North Grange formed two divisions of seven fields each, and Fentonhill and Parkend formed a third division. The seven fields in each of the first two divisions were pactioned to be cropped in such a manner "so that there should be at the expiry of the lease one field in clean fallow, or drilled green crop, three of said fields in sown grass, and the other three in corn crop." In the one division, the rotation of cropping was strictly observed; in the other, the state of the cropping for the last year was as follows:—one field in clean fallow, three fields in sown grass, of one, two, and four years old, and the remainder in crop; and he admitted, that a field of about fourteen acres, next adjoining to the field left in grass four years old, was broken up in 1826, when there was grass of two years old only, instead of three. In this way he alleged that the only deviation from the prescribed rotation was, that a field of grass of four years old was left in place of one of three, which was a difference much in favour of the respondent's interest. And he maintained that, supposing he was liable for breaking up that grass field in 1826, he could not be liable for additional rent, further than for that year, because he was entitled to break up that field for crop 1827. By paying the stipulated

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penalty or additional rent for doing so, the contravention would be entirely wiped off, because the respondents would thereby get the equivalent fixed on to discharge it; and such equivalent would place the matter precisely on the same footing as if the field had been in grass for crop 1826.

The Sheriff decerned in terms of the libel, and issued this note:—"There appears to be no doubt that the  
 "defender deviated from the prescribed rotation as to the  
 "field in question for crop 1826, and also for crop 1827,  
 "and must pay the additional rents for both years:  
 "that rent is no doubt high, but still it is rent, not  
 "penalty, and this Court must adhere to the bargain  
 "between the parties. On account, however, of the  
 "high additional rent, and that the pursuers have  
 "failed in some parts of the discussion, no farther  
 "expenses have been awarded than those previously  
 "found due."

The appellant brought the case under review of the Court of Session by advocacy, in which Lord Newton on the 9th December 1831, repelled the reasons, and remitted simpliciter; but found no expenses due. The appellant reclaimed to the Inner House; and the judges, being equally divided in opinion, ordered cases, on advising which they unanimously (16th May 1832) adhered.\*

Lawson appealed.

*Appellant.*—1. As the action is insisted in by the respondent, in the character exclusively of heiress of entail

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\* 10 S. & D., 531.

of her father, who died between Whitsunday and Martinmas 1826, and a payment of 200*l.* was made to her, which exceeds the half of the whole rent claimed, whether additional or penal, such payment extinguished her claim for the rent of the year 1826, even on the supposition that penal rent was due, seeing that the remaining half of that year's rent falls under the executry of her father, to which he has shown no title. It is not sufficient for her to say that she is entitled to the character of executrix, because, even if she were so, she does not sue in that capacity, but as heiress of entail. She describes herself, no doubt, as being the only child of her father; but this is descriptive merely of the manner in which she is his heir of entail, and does not imply that she is executrix, or has any right to the moveable succession of the deceased.

2. It cannot be held to have been the intention of the parties that the penal rent should be exigible in the case that has occurred. The lease specifies the object of the rotation to be, that "there will be always during the lease, and at the expiry thereof, in each of the two divisions, one field in clean fallow or drilled green crop, three of said fields in sown grass, and the other three in corn crop;" and the fact is, that there was, at the expiry of the lease, the proper number of fields in each division of the farm in grass, fallow, or green crop, and corn crop.

3. But, at all events, as the additional rent is an exorbitant penalty, and as the deviation from the mode of cropping was unintentional and venial, and the damage sustained of the most trifling description, it is in the power of the Court to modify the penalty to such an

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amount as the justice and equity of the case demand.\*

4. Supposing, however, the additional rent to be due and exigible for the year 1826, the claim for additional rent for the succeeding year, 1827, is inconsistent with the true meaning of the clause, which, being of an unfavourable nature, must receive the most strict and limited construction.†

The penalty stipulated for miscropping previously to the three last years of the lease, and for miscropping within the three last years, is imposed in respect of a deviation from the prescribed system of rotation; and it must be held to be satisfied by the payment for the year 1826, as being exacted in respect of “a deviation for (*i. e.* during) the three last years of the tack.” The clause does not authorize the penalty to be exacted oftener than once in respect of the same deviation, whether that deviation has taken place previous to the commencement of, or during the three last years of, the lease.

The Court below held, that the words “for the last three years of the tack” are intended to specify the time during which the additional penalty should be paid; whereas it is obvious that it was intended to specify the time within which the deviation inferring the penalty might be committed. If the deviation take place during those years, then the additional rent is to be exigible; but if it be paid for the first of the three

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\* Mackintosh v. Macdonald, 1st Feb. 1788, Mor. App. Tack. No. 5.

† Johnston v. Forbes, 22d Feb. 1639, Mor. 10037; Sir James Suttie v. Somner, 10th July 1828, 6 S. & D, 1122.

years, there is no provision that, if the same deviation be continued, the penal rent is to be due for the other two years.

*Respondent.*—1. The objection that the respondent has no right to recover any part of the additional rent for the year 1826, inasmuch as one half of the rent of that year belonged to the executors, and not to the heirs of the late Mr. Ogilvy, was overruled by the Sheriff by an interlocutor, of which the appellant did not complain in his advocacy. But, even if the question were still open, there is no ground for the objection. The respondent distinctly set forth that she was the “only child” of her father, as well as his heir of tailzie; and this amounted to a declaration that she was de jure the person entitled to the office of his executor; and it is not necessary that an executor be confirmed before raising an action. It is sufficient if he produce his confirmation before extract; and if it be not necessary that he be confirmed when he raises his summons, it cannot be necessary to state in his summons that he is so.

2. By the lease the appellant is permitted to take two crops of oats in succession, (a practice which under ordinary circumstances is reprobated as contrary to good management,) only on one condition, viz. that the ground shall have been previously three years in grass. But it is admitted that when the field in question had been only two years in grass, he took a crop of oats in 1826, and another in 1827. It is therefore of no relevancy to say that he left a field in grass four years old, even if the statement were accurate; and

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consequently, both according to the spirit and the words of the agreement, the additional rent is due.

3. It is not competent for the Court to modify the rent. It is laid down by Mr. Bell, in his Treatise on Leases,\* as the conclusion which is to be drawn from all the cases, that a “clause stipulating an additional rent, in order to enforce the conditions of the lease, will be literally interpreted even where the additional rent has been accidentally incurred, and although, from the powers reserved to the landlord, and from its disproportion to the actual damage sustained, it should amount to an exorbitant penalty.” This rule was enforced in *Frazer v. Ewart*.†

4. Equally untenable is the plea that the appellant is entitled, on paying the additional rent for the year in which he commenced the deviation, to continue to deviate in future years merely on paying the ordinary rent. It is plain that if he take two crops of oats from ground which has not been three years in grass he is guilty of a deviation for each of the crops so taken; and he deviates more from the spirit of the contract by taking the second crop than the first.

For let it be supposed that the appellant after two crops of oats (the ground having been three years in grass) had proceeded to take a third crop of oats, instead of fallowing the ground or sowing it with green crop, it is clear that in that case he would have been liable for the additional rent during that year; but if, during the next year he took a fourth crop of oats, then, according

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\* Bell on Leases, p. 202, note.

† *Frazer v. Ewart*, 25th Feb. 1813, Fac. Coll.

to the argument of the appellant, he would be liable in no additional rent at all, because if he had observed the prescribed rotation during the previous years, he was entitled during that fourth year to have had this particular field in oats, or barley, or wheat.

The lease stipulates not only that the farm during each year shall consist of a certain number of breaks, each under a particular crop, but also that each of these crops shall follow a particular course of previous cultivation. It is not enough that there shall be two sevenths only in oats. It is a part of the contract that one of these sevenths shall be oats from grass of three years old newly broken up, and that the other shall be a second crop of oats from grass of the same age.

LORD CHANCELLOR.—My Lords, I have thought it necessary to call upon the respondent's counsel for an answer only on one point; and upon that point the first question is, whether there be any or what portion of the rent which falls within the executry; and, in the next place, whether enough has been done in the proceedings to supply the defect in the summons? I should be extremely sorry if any material alteration were necessary in the interlocutor, the more especially (though it must be admitted that the point as to the defect of the summons was taken in the course of the argument) as I can find no appearance of any discussion having been given to it by the Court of Session; and it is exceedingly unpleasant, when a case comes before a Court of the last resort, to make any considerable alteration in the judgment upon grounds that do not appear to have occupied, any considerable portion of the attention of the Court. On

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the main point I have, in the course of the argument, thrown out that my opinion is in exact accordance with that which the Court below formed; but it is not quite correct to state, that this is a penalty which is to be taken with all that strictness of construction that is applied in the jurisprudence of Scotland upon matters strictly penal. There is a difference between the construction to be applied to a penalty imposed by one party upon another and the construction which is to be applied to a penalty arising out of that which is done by the voluntary compact of the parties themselves. A much less rigorous degree of construction may be applicable in the first case towards the party failing than to the party claiming the penalty of the failure in the second case. Although it is called pactional rent, that would not vary materially its penal nature; but a much more rigorous degree of construction is applicable where a party has with his eyes open laid himself under this prohibition, and has obliged himself to pay so much additional rent. It may not have been a very prudent bargain, but the party knew what he was about; and words can hardly be clearer than are used here. If the party breaks the conditions as to the cultivation during any of the years preceding the last three of the term, 3*l.* additional rent an acre, or any proportion of an acre, upon which he committed that contravention, was to be added to the pactional rent for the rest of the term. If it was in the last three years that the breach took place the 10*l.*, and not 3*l.*, for a very obvious reason, with reference to the rights of the landlord, was made the penalty. It is said that this construction, which at first the Court seem not to have adopted, upon one breach of the

condition would give a right to the landlord to claim the additional rent for every succeeding year though the breach was not continued. The Court first held that that was not the construction, though they unanimously afterwards came to that determination. But it is said, this is not for the interest of the landlord, for it will give the tenant a strong interest, (and there is some foundation for that argument,) if he commenced it, to continue cropping out the land, for he would be no worse off by repeated contraventions than by one. But it is said farther, that it would prevent an action for damages on the part of the landlord quoad the subsequent contraventions. That might be the consequence; but the increased rent during the rest of the year would not prevent an action for damages at the suit of the landlord if the tenant continued to contravene during the next year, for there would be no compensation by the increased rent. It is needless, however, to answer that argument, for he would be entitled to an injunction or an interdict; and there is a compact providing for it: he is to be allowed to have an interdict, as if he foresaw that he might be compelled to restrain the tenant from continuing the breach of the contract, and no answer could be given to an application for that preventive remedy by saying, I pay the pactional rent. The reply to that would be, Yes, you pay the pactional rent, but not for what you are now doing or in the course of doing, namely, the second breach, but in respect of the first breach of the contract, that breach extending the penalty through the whole term. I consider that is no substantial answer to the construction adopted unanimously by the Court below, and for that reason I did not call

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upon the counsel for the respondent to argue it; and all that remains is, to consider the other point, which goes to a considerable portion of the sum in question, and that, as I said before, resolves itself into two questions: first, whether from the nature of the lease any rent comes within the description of executry; and, secondly, if it does, whether what has taken place in the proceedings in the cause does not entitle the present respondent to hold the judgment for that as well as the remainder? And upon that point I move your Lordships that the farther consideration of this case be postponed. Adjourned.

LORD CHANCELLOR.—My Lords, I have looked again into this case and into my notes, and into some authorities, and the opinion I then held is confirmed. I have now, therefore, humbly to move your Lordships that the interlocutors appealed from be affirmed, but without costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

MONCRIEFF, WEBSTER, and THOMSON—SPOTTIS-  
 WOODE and ROBERTSON, Solicitors.

[9th August 1834.]

Lieutenant Colonel ROBERT HENRY, Appellant.

No. 21.

ALEXANDER M'EWAN, Respondent.

*Lease* — *Stat. 5 Geo. IV., c. 74.* — A landlord and tenant entered into missives of lease, in which the rent was fixed at a half boll of wheat, three firlots of barley, and six pecks of oats for each Scotch acre, payable by the fiars prices; but the proportions were not expressed which these measures bore to the imperial standard measure; and the landlord, under whose direction the missive of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon the act 5 Geo. IV. c. 74., ordaining uniformity of weights and measures. Held (affirming the judgment of the Court of Session) that the act did not apply to the case.

*Personal Objection.* — Question, whether under the above circumstances the landlord was barred from founding on the statute.

ON 17th of June 1824 an act was passed, (5 Geo. IV. cap. 74.) entitled “An Act for ascertaining and establishing uniformity of weights and measures,” the preamble of which bears, that “whereas it is necessary for the security of commerce, and for the good of the community, that weights and measures should be just and uniform : And whereas notwithstanding it is provided by the Great Charter that there shall be but one measure and one weight throughout the realm, and by the treaty of union between England and Scotland that the same weights and measures should be used throughout Great Britain as were then established

2D DIVISION.

Lord Moncreiff.



No. 21. “ in England, yet different weights and measures,  
 9th August “ some larger and some less, are still in use in various  
 1834. “ places throughout the United Kingdom of Great  
 HENRY “ Britain and Ireland, and the true measure of the  
 v. “ present standards is not verily known, which is the  
 M·EWAN. “ cause of great confusion and of manifest frauds.” It  
 was therefore enacted, that there should be uniformity  
 of weights and measures throughout the kingdom: and  
 for the accomplishment of this it was declared, that “ the  
 “ standard brass weight of one pound troy weight,  
 “ made in the year 1758, now in the custody of the  
 “ clerk of the House of Commons, shall be and the  
 “ same is hereby declared to be the original and genuine  
 “ standard measure of weight; and that the straight  
 “ line or distance between the centre of the two points in  
 “ the gold studs in the straight brass rod now in the  
 “ custody of the clerk of the House of Commons, whereon  
 “ the words and figures “ standard yard, 1760,” are  
 “ engraved, shall be and the same is hereby declared to  
 “ be the original or genuine standard of that measure of  
 “ length or lineal extension called a yard; and that that  
 “ weight and measure, or certain parts thereof, should  
 “ alone be sanctioned as of the standard or imperial  
 “ weights or measures from and after the 21st of May  
 “ 1835.” By the 9th section it is enacted, “ That any  
 “ contracts, bargains, sales, and dealings made or had  
 “ for or with respect to any coals, culm, lime, fish,  
 “ potatoes, or fruit, and all other goods and things com-  
 “ monly sold by heaped measure, sold, delivered, done,  
 “ or agreed for, or to be sold, delivered, done, or agreed  
 “ for, by weight or measure, shall and may be either  
 “ according to the said standard of weight, or the said  
 “ standard for heaped measure; but all contracts, bar-

“ gains, sales, and dealings made or had for any other  
 “ goods, wares, or merchandise, or other thing done or  
 “ agreed for, or to be sold, delivered, done, or agreed  
 “ for, by weight or measure, shall be made and had  
 “ according to the standard of weight, or to the said  
 “ gallon, or the parts, multiples, or proportions thereof,  
 “ and in using the same the measures shall not be  
 “ heaped, but shall be stricken with a round stick or  
 “ roller, straight, and of the same diameter from end to  
 “ end.” And by the 15th section it is enacted, “ That  
 “ from and after the 1st day of May 1825 all contracts,  
 “ bargains, sales, and dealings which shall be made or  
 “ had within any part of the United Kingdom of Great  
 “ Britain and Ireland for any work to be done, or for  
 “ any goods, wares, merchandise, or other thing to be  
 “ sold, delivered, done, or agreed for by weight or  
 “ measure, where no special agreement shall be made  
 “ to the contrary, shall be deemed, taken, and construed  
 “ to be made and had according to the standard weights  
 “ and measures ascertained by this act ; and in all cases  
 “ where any special agreement shall be made with  
 “ reference to any weight or measure established by  
 “ local custom, the ratio or proportion which every  
 “ such local weight or measure shall bear to any of the  
 “ said standard weights or measures shall be expressed,  
 “ declared, and specified in such agreement, or other-  
 “ wise such agreement shall be null and void.” By  
 the 17th section certain rules are laid down ascertaining  
 and fixing in England and Ireland “ the amount,  
 “ according to the standard of weight or measure by  
 “ this act established, of all existing contracts or rents  
 “ payable in grain or malt, or any other commodity or  
 “ thing, or with reference to the measure or weight of

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No. 21. “ any such grain, malt, or other commodity or thing,  
 9th August “ and the amount of any toll or rate heretofore payable  
 1834. “ according to any weights and any measures heretofore  
 HENRY “ in use within such counties, cities, towns, or places  
 v. “ respectively :” And it is declared, that “ the amount  
 M·EWAN. “ so to be ascertained shall be the rule of payment in  
 “ regard to all such contracts, rents, tolls, or rules, in all  
 “ time coming.”

The 17th section commences thus:—“ And for the  
 “ purpose of ascertaining and fixing the payments to be  
 “ made in consequence of all existing contracts or rents  
 “ in England and Ireland, payable in grain or malt, or  
 “ in any other commodity or thing, and in consequence  
 “ of any toll or rate heretofore payable, according to  
 “ the weights and measures heretofore in use, certain  
 “ rules shall be observed.” The 18th section is expressed  
 in the following terms:—“ For the purpose of ascertain-  
 “ ing and fixing the payments to be made of all stipends,  
 “ feu duties, rents, tolls, customs, casualties, and other  
 “ demands whatsoever, payable in grain, malt, or meal,  
 “ or any other commodity or thing, in that part of the  
 “ United Kingdom called Scotland, or in any place or  
 “ district of the same,” certain rules are prescribed.

This act was repealed by the 6 Geo. IV. cap. 12., in  
 so far as related to the date of its commencement, which  
 was postponed till 1st of January 1826; and it was  
 amended in some respects not material to the question  
 in the present case.

On the 20th of October 1827 the respondent made  
 an offer to the appellant (said to have been written by  
 the latter) in these terms:—“ Woodend, 29th October  
 “ 1827. Sir,—I make offer of the following yearly  
 “ rent for the farm of Ardbenny, as now possessed by

“ yourself, for a lease of nineteen years from the term of  
 “ Martinmas first, viz. one half boll of wheat, three  
 “ firlots of barley, six pecks of oats, all of the fiars  
 “ prices of the county, payable at two terms, viz.  
 “ Candlemas and Whitsunday, beginning the first  
 “ payment at Candlemas 1829; but as the fiars prices  
 “ may not then be fixed, a sum nearly what may then  
 “ be considered a half year’s rent shall then be paid to  
 “ account, and the balance of the year’s rent shall be  
 “ fully paid up at Whitsunday following, for each  
 “ Scots acre of arable land; you to give 35*l.* to assist  
 “ in building a house on the farm, deducted off first  
 “ rent, also the stones of the old office house, near the  
 “ present dwelling house. I am to put what is now  
 “ fences in repair, and keep them and leave so at the  
 “ expiry of the lease; and if any new fences shall be  
 “ necessary, I agree to make the same, you paying half  
 “ the expenses thereof, except the fences to protect your  
 “ plantations, which you shall keep up during the  
 “ lease. I am to have liberty of watering my cattle and  
 “ horses in the north east corner of the park, where the  
 “ dwelling house now stands; also liberty of a road for  
 “ my cattle to pass and repass through the ground  
 “ possessed by Mr. Andrew to the low ground of the farm.  
 “ The rotation of cropping:—First year oats, second  
 “ barley, third fallow or green crop, fourth barley or  
 “ wheat sown with grass seeds, fifth hay, sixth and  
 “ seventh pasture; or, in the tenant’s option, first year  
 “ oats, second year fallow, third wheat, the fourth green  
 “ crop, the fifth barley, the sixth hay. The dung and  
 “ fallow at present upon the farm to be allowed me  
 “ without valuation, at entry of the lease. I am to allow  
 “ what then may be upon the farm, without valuation,

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No. 21.      “ at the expiry of the lease. You are to have liberty of  
 9th August      “ the present road by the west of low ground. The  
 1834.      “ new wheel for the thrashing mill to be put up by  
 HENRY      “ you on or before Lammas next. The thrashing  
 v.      “ mill to be taken at valuation, without any payment at  
 M'EWAN.      “ the entry, and left at valuation at expiry of the lease.  
                   “ You shall have the liberty of the thrashing mill for  
                   “ the crop that is now upon Ardbennie. I agree  
                   “ to perform the carriage of four hundred stones  
                   “ of coals from Dollar to your house at Woodend.—  
                   “ I am, &c.

“ (Signed) ALEX. M'EWAN.”

“ To Colonel Henry at Woodend.”

This offer was accepted by the appellant in the following terms:—“ I agree to the above terms of lease  
 “ for the farm of Ardbenny, the mill being left of same  
 “ value at expiry as at entry. (Signed) ROBERT  
 “ HENRY.”

The respondent thereupon entered into possession of the farm at Martinmas 1827.

Disputes thereafter took place between the parties as to the principle on which the rent was to be converted into money; whereupon the appellant applied for sequestration of the respondent's effects, and raised an action before the Sheriff of Perthshire, concluding for removal of the respondent, in respect the lease made mention of Scotch acre, without specifying the ratio or proportion which it bore to the imperial acre. The Sheriff assilzied the respondent from the action of removing; and Lord Moncreiff refused a bill of suspension, and issued this note:—“ The Lord Ordinary is not convinced that the  
 “ complainer's very rigorous construction and application  
 “ of the statute to set aside a real right of lease, con-

“ stituted by a regular deed and full possession, has any  
 “ solid foundation ; but he does not mean, by refusing  
 “ this bill, to decide the question, which the complainer  
 “ may discuss in the reduction which he says he has  
 “ brought. He is of opinion that the Sheriff judged  
 “ rightly in holding that that question could not be  
 “ competently discussed in the form of an action of  
 “ summary removing in the Sheriff Court. The ques-  
 “ tion would be the same under the statute, if the  
 “ respondent stood infeft on a feu contract, against the  
 “ validity of which the same objection could be stated.  
 “ But it could never be maintained that the Sheriff  
 “ could, in a process of removing, declare the seisin  
 “ standing in the record null and void.”

In the meanwhile the appellant raised before the Court of Session an action of reduction, on the ground that “ the foresaid pretended missive or agreement, containing a special reference to the Scotch acre of land, according to which the rents of the defender’s possession were stipulated to be paid, and containing no specification of the ratio or proportion which the Scotch acre bears to the imperial standard acre, and as there are no bolls in the imperial standard measure for grain, is null and void, in terms of the act 5 Geo. IV. cap. 74. sect. 15.”

In defence the respondent pleaded, 1. That the clause of the statute had no application to contracts for the sale or lease of lands by the Scotch acre, or to rents payable in Scotland by bolls or other customary measures; and, 2. That the appellant was barred, personali exceptione, from attempting to take advantage of the enactments of the statute, even if they applied to this case, seeing that he had induced the

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respondent to enter into the lease, and, on the faith of it, to expend much money and labour in buildings and other improvements.

The Lord Ordinary, upon advising cases for the parties, reported them to the Court, and issued this note:—

“ The great importance of the question raised in this  
 “ cause, to the proprietors and tenants of this country,  
 “ renders it necessary that it should be decided by the  
 “ Court in a deliberate manner, and as speedily as cir-  
 “ cumstances will admit of.

“ The question itself appears to the Lord Ordinary to  
 “ be by no means free from difficulty. The point is  
 “ short and simple. The parties entered into a con-  
 “ tract of lease for nineteen years, by missive letters  
 “ exchanged, in which the terms and conditions of the  
 “ lease were definitely expressed, the rent being fixed  
 “ at a half boll of wheat, three firlots of barley, and six  
 “ pecks of oats for each Scotch acre, payable by the  
 “ fiars prices. The contract thus entered into was  
 “ followed by full possession of the farm, and by the  
 “ payment of a half year's rent. After this the parties  
 “ got into litigation. And now the pursuer (the land-  
 “ lord) insists in this action of reduction for setting  
 “ aside the contract of lease, on the ground that though  
 “ the missives have fully expressed the terms of the  
 “ bargain, they have not expressed the proportions  
 “ which the several measures mentioned bear to the  
 “ imperial standard measures, whereby he maintains  
 “ the lease is rendered absolutely void.

“ It is unnecessary to make any remark on the  
 “ general character of this plea. That is too plain to  
 “ require observation. But, whatever may be thought  
 “ of it, it must be dealt with according to law; and

“ when the Lord Ordinary reflects on the extent to  
 “ which leases liable to the same objection may have  
 “ been entered into, he must feel the importance of  
 “ carefully weighing the merits of it.

“ He is not at present able to enter into the view taken  
 “ by the defender, that the provisions of the statute do  
 “ not at all apply to contracts relative to the rents of  
 “ lands in Scotland. The words of the 15th section  
 “ appear to be so broad as naturally to comprehend  
 “ that case. But, considering them in connexion with  
 “ the 17th and 18th sections, there is very great diffi-  
 “ culty in coming to any other conclusion. For the  
 “ 17th section, which refers to lands in England, is  
 “ framed for the express purpose of regulating the  
 “ payment of rents under leases which were then exist-  
 “ ing; which seems to establish beyond any doubt,  
 “ that the 15th section was understood to comprehend  
 “ contracts for the rents of lands; and if the words  
 “ which relate indiscriminately to every part of the  
 “ kingdom, were understood to include contracts for  
 “ rent in England, it would not be easy to reach the  
 “ conclusion that they do not also comprehend similar  
 “ contracts in Scotland. The argument is therefore  
 “ reduced to the narrow point, that in the 18th section,  
 “ which relates to Scotland, the word ‘ existing ’ is not  
 “ used. But the Lord Ordinary has great difficulty in  
 “ thinking that this circumstance is sufficient to render  
 “ the scope and purpose of this clause different from  
 “ those of the 17th, or to convert it into a clause ex-  
 “ ceptive of rents in Scotland from the general opera-  
 “ tion of the 15th section.

“ Neither is he satisfied that bolls and firlots and  
 “ pecks and Scotch acres are not to be considered as

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“ local measures in the sense of the statute. He thinks  
 “ that they certainly are so. As to the bolls, &c., indeed  
 “ it might perhaps be held that they are to be taken as  
 “ meaning imperial bolls, firlots, and pecks, or the  
 “ measures defined in the sheriff's books as correspond-  
 “ ing thereto, nothing to the contrary being expressed.  
 “ But the Scotch acre is a measure so plainly peculiar  
 “ and local, that if the 15th section is to have any effect  
 “ it seems clearly to apply to it.

“ But although the Court should hold that these  
 “ pleas of the defender cannot be sustained, the Lord  
 “ Ordinary still thinks that the case is one of great  
 “ difficulty. The statute relates altogether to contracts  
 “ or agreements. But a lease, by the statute law of  
 “ Scotland, is something more than a contract. When  
 “ the contract has been clothed with possession it  
 “ becomes a real right. The decisions of the Court  
 “ have gone very far in establishing that any writing,  
 “ however defective in statutory requisites, if followed  
 “ by possession, constitutes a good lease to give the  
 “ tenant a real right under the act 1449. The most  
 “ informal writing, though it should not even express  
 “ the whole terms of the lease, or in particular the  
 “ precise rent, has been held sufficient to sustain the  
 “ title of possession, the terms being otherwise ascer-  
 “ tained. But if other statutes which are held to con-  
 “ tain sanctions of nullity, are overruled by the force of  
 “ possession, as constituting the real right, it will be a  
 “ very serious question whether the right must totally  
 “ fall, even where there is the most distinct and specific  
 “ and probative written contract, followed by possession,  
 “ wherever the provisions of the late statute have not  
 “ been observed.

“ If the plea of the pursuer be good, it must apply to  
 “ a feu contract or disposition, even after seisin has  
 “ been taken and recorded. This would be strong  
 “ enough. But yet even a feu right is not so strong a  
 “ case as that of a lease ; for a feu can only be made  
 “ by a regular deed, and seisin can only be taken on a  
 “ technical precept, and can only be made effectual by  
 “ a technical instrument. But the law is that a real  
 “ right of lease may be constituted by possession follow-  
 “ ing on the most informal writing. And the question  
 “ is, whether after a real right is so constituted under  
 “ all the former laws, it can be annulled by pro-  
 “ visions which relate only to simple contracts or  
 “ agreements.

“ The Lord Ordinary sees very well that there are  
 “ dangers and difficulties connected with this view of  
 “ the question. But the difficulty of supporting the  
 “ pursuer’s plea, consistently with the established law  
 “ of Scotland, appears to him to be very great ; and  
 “ the danger of it is manifest. At least, if a lease so  
 “ circumstanced is null and void, it is full time that a  
 “ matter of law, which must so constantly and deeply  
 “ affect the practice and good faith of both landlord  
 “ and tenants should be made clearly known.

“ The defender has endeavoured to maintain, that the  
 “ pursuer may be held to be barred from founding on  
 “ the statute by personal exception ; and the plea deserves  
 “ attention. But it is to be considered, that unless the  
 “ limits of such a plea could be very specifically deter-  
 “ mined there would be danger of defeating the statute  
 “ altogether ; and that it is not easy to see how a statu-  
 “ tory nullity in an agreement otherwise perfect, can  
 “ receive its fair effect, if facts inferring the consent of

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“ parties to waive it were sufficient to prevent the nullity  
 “ being pleaded.

“ With these remarks the Lord Ordinary reports  
 “ the case for the consideration of the Court.”

Thereafter their Lordships appointed the parties to be farther heard in presentia, by one counsel on each side ; and counsel having been accordingly heard, their Lordships, on the 25th of May 1832, repelled the reasons of reduction, sustained the defences, assolizied the respondent from the conclusions of the libel, and found expenses due.\*

Colonel Henry appealed.

*Appellant.*—1. The missives of lease are clearly null and void under the act of parliament, if that act applies to contracts for the lease of lands in Scotland. They constitute an agreement made with reference to the Scotch acre, and the Perth boll, firloft, and peck, and the stone of coals—all these being weights and measures established by local custom ; for there is no such thing as a boll, firloft, or stone in the imperial standard, while the peck referred to in the lease is the Perth, not the standard imperial peck. Although it is thus a special agreement with reference to weights or measures established by local custom, the ratio or proportion which such local weights or measures bear to the standard weights or measures is not expressed, which it is imperatively required to be under penalty of being null and void.

Considering the general object and spirit of the act, there is afforded a strong presumption that con-

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\* 10 S. & D., 572.

tracts of the nature in question, made after the passing of the act, were intended to be embraced by it; a presumption so strong, that nothing less than a total inability to reach such a contract under the words used by the act, or a positive express exception, could authorise the conclusion that they were intended to be or are excluded. This is established by the preamble, which is most comprehensive in the declaration of the object and purpose of the statute. In like manner the provisions in the 15th section are of the most general and extensive description; they are such as would be used where the utmost universality of application was intended. And, construing them with reference to the object and spirit of the act, and to what its preamble shows to have been the purpose and intention of the legislature, it is impossible that any room can be found for contending that they were not meant to apply to contracts for the lease of lands in Scotland.

The argument of the respondent, that the 15th section only relates to contracts regarding moveables, and where the whole subject of the contract can be stated to be "goods, wares, or merchandize, or other thing" of the same kind, is altogether unfounded. The words of that section, even although their meaning were not fully explained by the terms of the 17th and 18th sections, apply generally to all contracts, bargains, sales, and dealings which shall be made or had for any thing to be sold, delivered, done, or agreed for by weight or measure. But if, by a lease, land is agreed to be delivered to a tenant by the Scotch acre, this is plainly a contract, bargain, or dealing made or had for goods, wares, or merchandize, or other thing

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to be delivered, done, or agreed for by weight or measure established by local custom; and it cannot be held to be excluded, because land cannot be stated to come within the terms goods, wares, or merchandize.

Even if, in this limited view, the statute might not apply to a lease or contract for a lease of lands, it will be observed that the land to be given to the tenant is only one part of the contract, and that there is the counterpart of it in the rent to be paid by him to the landlord, which is to be paid in a certain quantity of grain, and by the carriage of a specified quantity of coals; therefore, the question remains, whether, although it were conceded that the subject of the contract on the one part might be agreed for by a measure established by local custom, without the agreement being brought under the statutory sanction of nullity, the subject of the contract on the other part, namely, the rent, payable in grain and by the carriage of coals, can be so agreed for without incurring that penalty.

Supposing that the stipulation as to the quantity of land may be made in any measure the parties choose to select, it is enough to bring the contract or lease within the statute, if it further amount to or contain a contract for something to be delivered, done, or agreed for by a local weight or measure, which thing is of a nature comprehended by the act.

Accordingly, the words of the 17th section distinctly show that where the rent is made payable in "grain or malt, or in any commodity or thing," if it be contracted or agreed for by any weight or measure established by local custom, the proportion which such weight or measure bears to the standard weights or

measures must be set forth, in order to save the contract from the declaration of nullity. It may be true, that if land may be contracted for by local measure, leases of land, although the measure applied to the land be a local measure, will not fall under the statute, because the rent may be made payable in money, or in some other way not requiring any observance of the provisions of the act. But if the rent is agreed to be paid in so many bolls of wheat and firlots of barley, and by performing the carriage of so many stones of coals, as in the present instance, there is clearly a contract or bargain or dealing "for goods, wares, or merchandize, "or other thing," to be delivered or done by weight or measure; and as these weights or measures are not standard weights, there is in such a case necessarily a special agreement with reference to a weight or measure established by local custom, which, in terms of the 15th section of the statute, rendered it necessary that the proportion which the boll and firlot and stone bore to the standard weights and measures should be expressly specified in the agreement to save it from nullity.

But the appellant cannot admit that even the delivery of a quantity of land in lease can be validly agreed for by a local measure, without the proportion which that measure bears to the standard measure being specified in the agreement, in the terms of 15th section of the act. Such an agreement falls within the words of the 15th section, when correctly construed with reference to the object and spirit of the act, more especially where the rent is made payable in grain or malt, or in any other commodity or thing embraced by the words of the 15th section.

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2. The plea of personal objection cannot be pleaded in defence to an action upon this statute. It is founded on public policy, and is to be enforced on that ground, and consequently it cannot be met by any personal exception against the party pleading it. If the agreement is legally void the homologation of parties cannot cure its defects.

*Respondent.*—1. The provision of the statute has no relation to contracts for the sale or lease of lands, or for the payment of rents: it relates entirely to contracts for work to be done, or for the sale and delivery of “goods, wares, merchandise, or other thing.” The general phrase, “other thing,” must, according to the well known rule of construction, be confined to things of the same kind with the goods, wares, and merchandise previously mentioned. And in confirmation of this rule, as applicable to the statute, it will be observed, that in the 18th section a rule is given for ascertaining and reducing to the new standard the payment of all “stipends, rents,” or other demands payable in grain or other commodity, in Scotland, and it does so without distinguishing between contracts made for such payments before or after the date of the statute, which is the more remarkable, as in the immediately preceding sections relative to England and Ireland the enactment is confined to “existing contracts or rents,” which limitation seems, *ex preposito*, to have been omitted as to Scotland.

The provisions made in these two sections prove clearly that the 15th applies exclusively to mercantile transactions and to agreements for the performance of work.

If the argument of the appellant were well founded in regard to a lease of land, it would equally apply to a feu contract; and all feu contracts entered into subsequent to the date of the statute, whereby any part of the feu duty is made payable in grain according to the measures still in use, would be utterly void. It seems impossible, however, that this can be maintained consistently with the express enactment relative to rents, feu duties, and other demands payable in grain, as specified in the 18th section. A lease of land or a feu contract is a complex transaction, not embraced or falling within either the words or spirit of the enactment. It is not an agreement for the performance of work, or for the sale or delivery of goods, wares, or merchandise. It is a contract for the delivery of land; and although the stipulated rent or return may form a part of the agreement, it is not the substantial or main part of the transaction. The delivery of land is the main and principal part of the contract of lease or feu, and the rent is merely the accessory or subordinate part of the contract.

Besides, even if the enactment could be held to have such a meaning as that contended for by the appellant, the question would remain, how far the nullity could apply to a lease upon which possession had taken place. Such a lease is a real right, and not an agreement. But independent of this, and supposing the missive was objectionable under the statute, the possession would exclude the objection altogether. Thus, a missive of lease which is not tested in terms of the statute 1681, or which is not holograph, is null; but if possession has followed upon it, it is thereby rendered valid; and it is vain for either of the parties afterwards

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to allege it was originally null in consequence of the statute 1681, and that as it could not at first have afforded a sufficient title whereby the possession could have been demanded, or any of the stipulated rights enforced, it cannot now afford a sufficient title whereby the possession may be maintained. It is equally vain for the appellant, after possession has taken place, to attempt to set the lease aside on the grounds now pleaded by him.

2. Even if the statute applied to this case, the appellant is barred, *personali exceptione*, from attempting to take advantage of the enactments. The missive of offer was written in the appellant's own presence, and under his direction. He thus entrapped the respondent to make an offer for a lease of a certain endurance, but which, according to his present plea, was to be binding upon him only so long as he thought proper. While the tenant was bound to the landlord for a certain term of years, and while the landlord seemed to be equally bound to the tenant for the same period, he secretly reserved the power of putting an end to the lease whenever he pleased. In short, it was a lease for a term of years so far as related to the tenant, but a lease at will so far as regarded the landlord. Nothing more unjust can be conceived; and whatever the landlord may plead in apology for his conduct, its practical result, so far as the tenant is concerned, involves a fraud, of which he cannot be allowed to avail himself.

LORD CHANCELLOR.—My Lords, I do not at present feel it to be necessary to call on the counsel for the respondent, but I propose to take an opportunity of looking particularly into the act of parliament upon

which this question arises, and the authorities, (if authorities there are,) to see whether the opinion I have formed from the argument I have heard is well founded. If I should, on such reference, be led to entertain any doubt, I will then propose to your Lordships to hear the counsel in support of the judgment of the Court of Session. My Lords, those who maintain that this penalty attaches to the use of any other than the imperial measures prescribed by the act of parliament must found upon the 15th section of that act; for it is needless to observe, that we are not to assume in favour of penalties and forfeitures,—they must be enacted by express words; there is no doubt that if there are words in any other section, reference to which will tend to explain and effectuate the intention of the Legislature in a particular section, they may be adverted to; a deficiency in that respect may be supplied by reference to other parts of the statute, the preamble, and even the title; but if, with the explanation which may be thus afforded to the words of the clause enacting the penalty or forfeiture, there is a deficiency in that clause, and the penalty or forfeiture is not enacted, it is not in the power of the Court to assume such to have been the intention of the Legislature. The first matter, however, is to consider the words themselves; they are, “that all contracts, “bargains, sales, and dealings,” (very large—but then comes this,) “which shall be made or had within any “part of the united kingdom of Great Britain and Ire- “land for any work to be done, or for any goods, wares, “and merchandise.” Now these are the very technical expressions by which the law designates personal property as contradistinguished from real property;—to say that land or a house may be called merchandise, because

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it may be made the subject of traffic, and turned into money, would be a very wild and a very novel mode of interpretation, either in etymology or common parlance, or in respect of the legal acceptance of terms in an act of parliament. The words "goods, wares, and merchandise," are generally, indeed I may say universally, the very words which the Legislature and pleaders employ to designate that which is not real property, but strictly matter of personal property, the subject of traffic and delivery from hand to hand, and as to which there is this difference distinguishing it from real property, that the possessor becomes possessed of it by the actual transfer or delivery of the thing itself, and not a symbolical delivery, as in the case of land or other real property, as to which the possession of the thing is impossible; possession is delivered in the one case by putting the article of merchandise into the custody and corporeal keeping of the party, whereas possession is delivered in the other case in a reverse mode, namely, by putting the person to whom it is to be transferred into possession of the premises, according to the doctrine we hold in livery of seisin, that being required to be given on the lands. It has been argued here, and was argued in the Court below, and Lord Cringletie, in giving his judgment, appears to have adverted to it, that this may be considered to be a contract for the sale and delivery of grain. No doubt it is one part of the contract, that grain is to be delivered; but is it not a forced, if not a violent construction, to say that this is a contract, not for the letting of land, but for the delivery of grain, because the consideration the party receives for the use of the land is so much grain, or the value of so much grain? Should we not reckon it a new mode of

speech, to say, I have been making a contract for the purchase of so much wheat, when, if you were to ask what price did it fetch, or what did you agree to give, you would reply, "I did not agree to give money at all, but I agreed to let the man with whom I dealt have the use of so many acres of my land, and for that I am to receive so much grain twice a-year?" The person with whom you are conversing would say, "You surprise me; then you have merely agreed to let land instead of purchasing wheat. You might equally say, that because you sold articles for which you were to be paid in gold, therefore it was a bullion transaction; or that, though goods were the subject matter, because they were paid for in money, therefore it was a money transaction." In the common acceptance of terms, the grain to be returned is the rent reserved, just the same as if it were in monies numbered. It is not merely in common parlance, but in legal phraseology, that this would not be considered a sale of wheat, because it did so happen that the rent reserved was in grain, and not in money. There is an illustration which suggests itself in the very manner in which the Legislature have enacted in respect of penalties, and in respect of nullity. In the stamp act, your Lordships are aware that agreements, generally speaking, are subject to a stamp duty; but the statutes in favour of trade except agreements "in respect of goods, wares, merchandise." Now, could it be said, that because this rent was to be paid by so much grain rendered at Michaelmas and Whitsuntide, therefore the agreement was exempted from the operation of the stamp act, as being "in respect of goods, wares, and merchandise?" It is a contract for the use and occupation of the land,

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and the consideration is the payment of so much grain, or the value of it, according to certain prices, at two periods of the year. But an observation has been made upon the words, "or other thing," which follow "goods, wares, and merchandise." Generally speaking, there can be no doubt that the rule is inflexible, that if, after an enumeration of particular things, words of that kind are added, they must be taken by reference to the preceding enumeration to the things ejusdem generis, unless it can be shown from any other part of the statute that the Legislature meant to make an exception in that particular case; and I may venture to say, that there never was a case in judgment, and much more a case on the words of an act of parliament, in which there was an enumeration of particular things in which a different rule was adopted, unless there were expressions which gave ground for such a construction. The authorities would be ransacked in vain; you would not find an instance in which under chattels matters of real property have been considered as included; that where it was said "chattels and other things," those "other things" were held to include real property. I cannot conceive that those words, on any soundness of construction, or any precedent, legislative or judicial, were ever so considered. Then it says, "other things sold, delivered, done, or agreed for by weight or measure." Now, the stretch to which you are compelled to resort is, that it must be a taking or letting of land by weight or measure. I think, upon this view of the subject, the Court below has come to a sound conclusion, in considering that the lease of the land is not drawn in such a manner as to bring it within this clause. Then the act says, "and in all cases where

“ any special agreement shall be made with reference  
 “ to any weight or measure established by local custom,  
 “ the ratio or proportion which every such local weight  
 “ or measure shall bear to any of the said standard  
 “ weights or measures shall be expressed, declared, and  
 “ specified in such agreement, or otherwise such agree-  
 “ ment shall be null and void.” If these words had  
 stood alone,—if this branch of the section had stood  
 without the preceding part,—I think there would have  
 been a much stronger ground in behalf of the present  
 appellant, and against the judgment below; but  
 coupled as it is with what preceded, it must be taken to  
 be applicable to chattel interests alone,—those chattels  
 capable of delivery and possession. Taking this branch  
 of the section in connexion with that which precedes it,  
 I think the whole must be confined to that particular  
 subject. I see Lord Moncreiff appears to have had  
 very considerable doubts whether bolls, and firloths, and  
 pecks, and Scotch acres, are not to be considered local  
 weights or measures in the sense of the statute. They  
 are local, as contradistinguished from imperial; but they  
 are not more local than many weights and measures we  
 have in England. I should have very great doubts upon  
 that; but it is not necessary to go into that on the pre-  
 sent occasion; it would certainly open a door to very  
 considerable doubts as to the effect of this statute. I  
 cannot help thinking that the Legislature must have  
 intended to put down the Scotch weights and measures,  
 except so far as they have introduced them into this act.  
 I cannot look at this statute without a very strong im-  
 pression upon my mind that it was not drawn with all  
 that degree of care and accuracy which might be wished;  
 one cannot see why the same degree of nullity should

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 extended to personal property; but if it is not done,  
 9th August 1834. that is what is to guide us. I think the ninth section,  
 where the words are almost precisely the same, (as is  
 HENRY justly remarked by the Lord Justice Clerk in giving his  
 v. judgment in this case,) throw very considerable light  
 M'EWAN. upon the construction of this clause; for the words which  
 are used in those two sections, and the manner in which  
 they are used, is of necessity exclusive of all possibility  
 of their being intended to apply to any thing else "but  
 "goods, wares, or merchandise, or other thing" of the  
 same nature. This renders it, if possible, still clearer  
 that the contracts, bargains, and so forth, are those with  
 reference not to land but to personal chattels. I shall  
 look, my Lords, anxiously into this again, and shall  
 refer to the English as well as the Scotch statute. I  
 should be sorry to put a construction upon the act which  
 may tend to the defeating of those objects which the  
 Legislature had in view. If I should, after having done  
 so, entertain any doubt, I shall call upon the counsel for  
 the respondent to address your Lordships on the case.  
 If not, I shall not subject either your Lordships or the  
 parties to that trouble. I must say I feel no reluctance  
 in protecting this defender against this action of reduc-  
 tion. I understand it to be an action of reduction,  
 brought by the landlord, who takes advantage of the tenant  
 because the requisition of the statute has not been com-  
 plied with, and on that ground he avails himself of this act,  
 to endeavour to set aside this lease. Every one has a right  
 to that which the law gives him; still the Court may feel  
 great satisfaction if the law which has been supposed to  
 be in favour of this course of conduct is in reality not in  
 favour of it, but is in favour of the right of the defender.

Before closing the few observations with which I have taken the liberty of troubling your Lordships upon this case, I wish to call your attention, and the attention of the learned counsel on both sides, to the manner in which certain matters have been brought upon the pleadings. The Lord Ordinary, by his interlocutor of the 5th of March 1830, appointed the pursuer to give in a condescendence, framed in terms of the acts of parliament and sederunt, of the facts he avers and offers to prove in support of his action, and the defender to answer the same, framed in like terms. The manner in which that interlocutor has been acted upon is, in averring the existence and the construction of the law. The law is pleaded as a matter of fact. The party pleads an act of parliament,—not a local act, but a general statute, as public as Magna Charta, or the Bill of Rights, or any of the other known statutes of the realm, and yet the 4th article of the revised condescendence states, “ That by the act of 5 Geo. IV. “ cap. 74, entitled an act for ascertaining and establish- “ ing uniformity of weights and measures, certain “ standards of weights and measures are established “ throughout the kingdom of Great Britain and Ireland; “ and that by the 15th section of said act it is enacted, “ that from and after the 1st day of May 1825 all con- “ tracts, bargains, sales, and dealings which shall be “ made and had within any part of the united kingdom “ of Great Britain and Ireland, for any work to be “ done, or for any goods, wares, merchandise, or other “ things to be sold, alienated, done, or agreed for by “ weight or measure, where no special agreement shall “ be made to the contrary, shall be deemed, taken, and “ construed to be made and had according to the

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“ standard weights and measures ascertained by this act ;  
 “ and in all cases where any special agreement shall be  
 “ made with reference to any weight or measure estab-  
 “ lished by local custom, the ratio or proportion which  
 “ every such local weight or measure shall bear to any  
 “ of the said standard weights or measures shall be ex-  
 “ pressed, declared, and specified in such agreement, or  
 “ otherwise such agreement shall be null and void.”  
 To this the answer sets forth, humorously enough,  
 “ admitted that the statute here mentioned was passed.”  
 And it goes on, “ and that it contains the enactments  
 “ here quoted, and various other enactments.” This is  
 the pursuer’s condescendence, stating this act or law as  
 a matter of fact. The defender, in like manner, in  
 article 5th of his statement, avers his construction of  
 the statute as a matter of fact thus: “ The enactment of  
 “ the statute founded on by the pursuer makes no men-  
 “ tion of the sale or lease of land, and by the 18th  
 “ section of the statute a rule is given for ascertaining  
 “ or reducing to the new standard the payment of all  
 “ rents, stipends, or other demands payable in grain or  
 “ other commodity in Scotland. By the 19th section  
 “ of the statute the sheriff of each county is appointed  
 “ to ascertain, in the manner therein prescribed, the  
 “ amount by the standard measure of all rents, feu-duties,  
 “ stipends, &c., payable in grain, according to the weights  
 “ and measures heretofore used, and accurate tables are  
 “ ordered to be prepared and published, showing the  
 “ proportions between these weights and measures and  
 “ those established by the statute.” To that he pleads  
 his own commentary or argument on the law as a matter  
 of fact, as coming within the terms of the condescend-  
 ence. But I must say, that the pursuer does not treat

with the same courtesy the plea of his adversary which that adversary had shown to him. The defender candidly said that the act was passed, and that it contained that section and other sections; but the pursuer says, “denied”—he denies it altogether, “and the statute “itself is referred to.” Certainly, my Lords, this is not a very creditable course of proceeding for the pleaders in the Court below; and though we have been going on for twenty years endeavouring to get them to strictness of pleading, and to bring them to articulate condescendence, and not arguing law and fact together, a case now comes up with such inconsistencies and confusion of law and facts. I should hope that the attention of the Court being called to this, they will take the proper steps to confine the parties to that which is called for by the interlocutor, otherwise the laying down of rules is of very little use. My Lords, I will say no more at present, but that I shall apply myself to the construction of the act of parliament, and probably consult such of the English Judges as may be in town, on this matter, so far as regards the construction of the statute in the Courts of this country. If I entertain, in the result, the least doubt upon it, I shall then propose to continue the argument on another day.

Adjourned.

LORD CHANCELLOR.—I stated at the close of the argument why it appeared to me that the Court below had come to a right conclusion upon this very extraordinary case. It is a case in which the appellant, Lieutenant Colonel Henry, the landlord, sought to set aside, under the 15th section of the 5th George IV. cap. 74., a tack, or an agreement for a lease, which he had given to the respondent. If the law was with him, he had a

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right to take advantage of the nullity of that tack. I stated my opinion upon it formerly, but at the same time expressed a wish, before I finally decided it, to communicate with some of the learned judges in England, as it affected both English and Scotch questions. That communication and further consideration confirm the opinion I then expressed, and I shall now move your Lordships to affirm the judgment. The section is in these terms: "That from and after" such a day "all  
 " contracts, bargains, sales, and dealings which shall be  
 " made or had within any part of the United Kingdom  
 " of Great Britain and Ireland, for any work to be  
 " done, or for any goods, wares, merchandise, or other  
 " things to be sold, delivered, done, or agreed for, by  
 " weight or measure, where no special agreement shall  
 " be made to the contrary, shall be deemed, taken, and  
 " construed to be made and had according to the standard  
 " weights and measures ascertained by this act; and in  
 " all cases where any special agreement shall be made,  
 " with reference to any weight or measure established  
 " by local custom, the ratio or proportion which every  
 " such local weight or measure shall bear to any of the  
 " said standard weights or measures shall be expressed,  
 " declared, and specified in such agreement, or other-  
 " wise such agreement shall be null and void." It is said this is an agreement for the sale of grain, because the rent reserved is in grain, and that it is not expressed according to the imperial standard. But, my Lords, it is an abuse of terms, and a very gross abuse of terms, to call an agreement for a lease an agreement for a sale of corn. The rent is to be received in corn; but it is contrary to the common sense of mankind to consider this section as intended to cover such a dealing as this, what-

ever the words of the section, or of any other section, to which reference was made in the argument, and on which I commented in the course of the argument, and to which I received no satisfactory answer from those whom I pressed with it; namely, the 9th section, which uses the very same words, “that any contracts, bargains, sales, and dealings made or had for or with respect to any coals, culm,” and so on, “and all other goods and things commonly sold by heaped measure, sold, delivered, done, or agreed for, or to be sold, done, or agreed for by weight or measure,”—using the very same words. Now, see what is to be done: that it “shall and may be either according to the said standard of weight, or the said standard of heaped measure; but all contracts, bargains, sales, and dealings made or had for any other goods, wares, or merchandise, or other thing, done or agreed for, or to be sold, delivered, done, or agreed for by weight or measure, shall be made and had according to the said standard of weight, or to the said gallon, or to the parts, multiples, or proportions thereof; and in using the same the measures shall not be heaped, but shall be stricken with a round stick or roller straight, and of the same diameter from end to end.” These words remove all doubt. It is clear this does not mean an agreement for the sale of land, nor for doing any thing with respect to the land, but a bargain for the sale of goods, wares, and merchandise, which could be measured by standard measure, or weighed by standard weight. I have no doubt whatever that the Court below decided quite correctly, and I shall move your Lordships that the judgment of the Court be affirmed; and to allow costs, not exceeding 250*l.* Colonel Henry had a right

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to be as harsh as the law would allow him to be. He had a right to say, I, a well-informed man, used to the construing acts of parliament, know that this 15th section of the 5th of George IV. cap. 74. applies to my case; but that I will keep to myself. I will not say a word about it, but I will have the lease drawn up, all the while knowing it to be a nullity, and will afterwards take advantage of the nullity of which my ignorant tenant was not aware, and will turn him round when he least expects it. Colonel Henry may reconcile that to his own feelings of propriety; he may satisfy his own conscience; and a man has a right to adjust his conscience according to the law of the land. Those who deal have a right to the protection of it, and have a right to enforce it; but let every man take care that he exercises a good judgment,—that he does not go farther than the law will carry him; if he does, he must take the consequences. Colonel Henry brought his tenant, first before the Sheriff, then the Court of Session, and afterwards before your Lordships' House. It appears to me that, under such circumstances, the respondent ought to receive his costs. I shall therefore move your Lordships that this judgment be affirmed, and with costs not exceeding 250*l*.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of 200*l*. for his costs in respect of the said appeal.

A. H. M'DOUGALL—A. and R. MUNDELL, Solicitors.

[14th August 1834.]

THOMAS M<sup>c</sup>MILLAN and others, Appellants.—*Lord* No. 22.  
*Advocate (Jeffrey)*—*Tinney.*

CHARLES CAMPBELL and others, Respondents.—  
*Dr. Lushington*—*Macdougall.*

*Entail—Trust.*—Held (affirming the judgment of the Court of Session) that a trust deed conveying lands for behoof of creditors, and on which the trustee is infeft, does not so divest the granter as to prevent him from granting a procuratory of resignation and deed of entail.

IN 1797 the late Mr. Campbell of Combie, being 1ST DIVISION.  
 proprietor in fee simple of, and feudally infeft in, the Ld. Moncreiff.  
 lands of Auchnonard and other lands, executed a disposition of them and of his whole effects, in trust for behoof of his creditors, to Mr. Ferrier, W. S.; whom failing, to “such other person as may hereafter be named and appointed by my said creditors,” &c., with power, “without any further advice or consent of me or my creditors, to sell and dispose of the lands,” &c. privately or publicly, on such terms as he thought fit, after advertisements; to receive payment of the price, and “to grant dispositions, discharges, and other writings necessary, with all clauses needful, to the purchasers of the said lands, &c.; and that simply, so as that the said purchasers shall be nowise concerned with the application of the prices thereof, nor be

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“burdened or affected with any of the provisions or  
 “conditions herein contained, but shall only be subject  
 “to pay their respective prices to the said trustee, or  
 “to any factor or cashier nominated by him, or to my  
 “said creditors, as the acting trustee shall direct.”  
 The deed then declared, that, “after deduction and  
 “payment of my debts, the trustee shall make pay-  
 “ment to me, my heirs or assignees, or to any person  
 “or persons to whom I shall direct the same to be  
 “paid by a writing under my hand, at any time in my  
 “life (secluding executors), of the residue of my said  
 “funds, if any shall remain, and shall convey and re-  
 “dispone to me and my foresaids the remainder of my  
 “said lands and estate, in case any part thereof shall  
 “remain unsold,” &c. It contained procuratory and  
 precept, and Mr. Ferrier took infestment under the  
 precept, sold a considerable part of the lands, and  
 granted dispositions to the purchasers. When the  
 debts were thus very much reduced, he executed, on  
 the 24th of March 1808, a disposition reconveying the  
 unsold lands to Mr. Campbell, under burden of the re-  
 maining debts. This deed contained only a procuratory  
 of resignation ad remanentiam.

On the 21st of May 1808 Mr. Campbell expedite an  
 instrument of resignation, which set forth that it pro-  
 ceeded in virtue of a procuratory contained in a dis-  
 position of the lands, “dated the 25th of March last,  
 “executed” by Mr. Ferrier in his favour, and the  
 instrument was erased in the date. Thereafter  
 Mr. Campbell executed an entail, in the form of a pro-  
 curatory of resignation, of the above lands, in favour of  
 himself in life-rent, and his eldest son Charles Campbell  
 in fee. The procuratory was recorded in the register

of tailzies in 1814; and after Mr. Campbell's death, his son Charles obtained, in virtue of the procuratory, charters of resignation from the several superiors of the lands, on which he was infeft.

Charles Campbell having subsequently contracted several debts to the appellants Thomas M'Millan and others, they raised an action of reduction of the instrument of resignation ad remanentiam expedite on the procuratory of Mr. Ferrier, and also of the procuratory of resignation in favorem containing the entail, with the charters and infeftments following thereon, on two grounds: 1, That the instrument was improbativ, being erased in substantialibus, and did not proceed in virtue of the disposition 24th March 1828; and 2, That David Campbell, the father, was, by the infeftment of Ferrier under his disposition, divested, except as to a bare mid superiority, and therefore could not validly grant the procuratory containing the entail; and consequently the appellants, as creditors of his son, were entitled to charge him to enter heir in fee simple, and thereupon to adjudge the lands.

The Lord Ordinary having reported the question on Cases to the Court, and issued the subjoined note<sup>1</sup>,

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<sup>1</sup> Note by the Lord Ordinary.—“ As this case involves important questions, and is prepared on Cases, it appears to the Lord Ordinary that it may be most convenient for the parties and the Court that it should be reported without a judgment; but he shall state the views which occur to him on the points of law raised.

“ 1. He is inclined to think that the objection stated against the validity of the instrument of resignation ad remanentiam is a good objection. There can be no doubt that the date of the disposition containing the procuratory in virtue of which the resignation had been made is an important and essential part of the instrument. The instrument clearly bears two erasures in the date; and whatever ingenious reasonings may be used as to the words which could or did stand in the deed before the erasures were made, the Lord Ordinary



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their Lordships found “ that David Campbell, not  
 “ having been divested by the trust deed, had power

“ apprehends that the legal rule is, that the words must be taken pro  
 “ non scriptis, in which case the instrument is blank as to the year in  
 “ which the disposition was executed. The case of Maxwell v. Houston,  
 “ quoted by the defender, was different in this respect, the import of the  
 “ clause being the same in law, with or without the word written on  
 “ erasure. There is further, in the present case, a discrepancy in the  
 “ day of the month, the instrument bearing that the disposition was dated  
 “ on the 25th of March, whereas the disposition founded on is dated the  
 “ 24th of March. The Lord Ordinary thinks this alone fatal, because,  
 “ on the face of these title deeds, non constat that there may not have  
 “ been another disposition and procuratory bearing the date of 25th  
 “ March.

“ 2. If the instrument of resignation ad remanentiam is held to be  
 “ invalid, the consequence is, that David Campbell, the maker of the  
 “ entail, had no feudal title under the disposition in his favour by  
 “ Mr. Ferrier. His titles then stood thus :—He originally stood fully  
 “ invested under his original titles to the estate, before he conveyed it to  
 “ Mr. Ferrier;—he had disposed it to Mr. Ferrier in trust for the pay-  
 “ ment of his debts, and with a power of sale, under an obligation to  
 “ reconvey the residue to himself, or his heirs or assignees; and on this  
 “ conveyance Mr. Ferrier stood infeft. And by Mr. Ferrier's disposition  
 “ to David Campbell there was a personal right vested in him, with an  
 “ unexecuted procuratory of resignation. The question between the  
 “ parties is, whether, under any of these titles, David Campbell had  
 “ power to execute a deed of strict entail in the form of a procuratory of  
 “ resignation to the effect that, when the title was completed by charter  
 “ and sasine, the entail should be effectual against the creditors of his  
 “ immediate heir.

“ 3. It is maintained that David Campbell had power to execute the  
 “ entail,—1, in virtue of his original radical title preceding the trust convey-  
 “ ance to Mr. Ferrier; and, 2, in virtue of the personal right which stood  
 “ in him under Mr. Ferrier's disposition. The first of these points appears  
 “ to the Lord Ordinary to be the most important; and he thinks that it is  
 “ ruled by the principle first settled in the case of the creditors of  
 “ Campbell of Ederline, 14th January 1801. It seems to be impossible  
 “ to explain away the doctrine of that case in the manner attempted by  
 “ the pursuers. The facts are simple :—Dugald Campbell stood infeft  
 “ in the estate; he conveyed his estate, heritably and irredeemably, to  
 “ trustees, expressly for payment of his debts, with power to sell, and  
 “ under an obligation to reconvey any residue under a strict entail. The  
 “ trustees were infeft. Mr. Campbell died, and a competition arose  
 “ between adjudgers from the trustees, and prior adjudgers who had  
 “ proceeded directly against the estate, as in hereditate jacente of him, by  
 “ charging his heir to enter. There could not be a more perfect state of  
 “ the case for trying the question whether the feudal title subsisted in the

“ to execute the procuratory of resignation containing  
 “ the entail, and that the titles made up under it were

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“ truster. The creditors who adjudged the hæreditas jacens did not  
 “ adjudge any mere jus crediti;—they adjudged the estate itself by  
 “ charging the heir to enter, which charge necessarily implied that it  
 “ was competent for the heir to be served in special as heir of the  
 “ investiture; and accordingly the interlocutor of Lord Eskgrove,  
 “ adhered to by the Court, expressly found that Dugald Campbell ‘ was  
 “ ‘ not completely divested of the real right and property of his estate by  
 “ ‘ the trust right and infeftment thereon founded on by the objectors,  
 “ ‘ the same having been a trust for the granter’s behoof, though it  
 “ ‘ contained a power to the trustees of selling the lands,’ &c. The Lord  
 “ Ordinary is of opinion, that whenever an estate can be adjudged as in  
 “ hæreditate jacente, to the effect of carrying a feudal title by charter of  
 “ adjudication, it must be equally competent to the heir to be served and  
 “ infeft; and he thinks it a self-evident proposition, that whenever a  
 “ man’s title so stands by his investiture, that upon his death his heir  
 “ might be served, and get a feudal title, directly as heir, he himself  
 “ must be in titulo, while alive, to convey the estate, subject to all existing  
 “ burdens; because, if his investiture subsist to the effect of the estate  
 “ being carried by the service of his heir, he must have, by his sasine, the  
 “ powers of an undivested fiar to convey, however he may be restrained  
 “ by conditions or affected by burdens. The case of Ederline settles  
 “ the point that a trust conveyance almost identical with the trust in the  
 “ present case does not divest the granter of his feudal title, and is only  
 “ to be considered as a burden on that title. The form of the question  
 “ in that case appears to have been very favourable for bringing out the  
 “ point. But it occurred much more lately in a case not adverted to in  
 “ the papers,—the case of W. Bellenden Ker against the Trustees of  
 “ Lady Essex Ker. John Duke of Roxburghe conveyed his whole  
 “ unentailed estates to trustees for payment of his debts, and then for  
 “ purposes to be appointed by him. On his death the trustees were  
 “ infeft in his estate. The heirs at law, Lady Essex and Lady Mary  
 “ Ker, challenged the deed by which the residue was settled; and  
 “ having succeeded, they obtained a conveyance from the trustees, and  
 “ completed their title. But afterwards a defect occurred in regard to  
 “ the transmission of a part of the estate from Lady Mary to Lady  
 “ Essex, in consequence of which Mr. Bellenden Ker and others, as  
 “ heirs at law, claimed those lands, as not having been so vested in Lady  
 “ Essex as to warrant her conveyance of them. In order to obviate this  
 “ plea, it was maintained that Lady Essex and Lady Mary Ker, before  
 “ getting the title from the trustees, had made up a title by adjudication  
 “ upon a trust-bond directed against the estate as in hæreditate jacente of  
 “ Duke John himself; and as Lady Essex had a general service to Lady  
 “ Mary, it was maintained that this title by adjudication, which had  
 “ remained personal, was sufficient to vest a personal right in her, which  
 “ she could convey. The Court had no doubt that that adjudication by

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“ validly and feudally made up; and therefore as-  
 “ soilzied the defenders from the conclusions of this  
 “ action.”<sup>1</sup>

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“ trust bond was a valid title, clearly assuming that a feudal title remained  
 “ in Duke John and his hæreditas, notwithstanding the trust deed and  
 “ the infestment on it. It was found, indeed, to have been superseded  
 “ by the complete feudal title established under the conveyance of the  
 “ trustee; but there was no doubt entertained that it was a valid form  
 “ of obtaining a feudal title in the estate, subject to the burden of the  
 “ trust. In the case of Sir James Fergusson, the conveyance to Lord  
 “ Hermand was ex facie absolute and unconditional.

“ The Lord Ordinary therefore thinks the point quite settled; and as  
 “ he cannot enter into the idea that these cases suppose merely the  
 “ competency of adjudging a jus crediti or personal claim to be made  
 “ effectual through the trust, but, on the contrary, thinks that they  
 “ necessarily import that a direct feudal title might be taken as remaining  
 “ in the truster, he is of opinion that the plea of the pursuers is thereby  
 “ met by a conclusive answer.

“ 4. The separate ground taken by the defender, that the entail was  
 “ effectual under the personal right vested by Mr. Ferrier's disposition,  
 “ appears to the Lord Ordinary to be very doubtful. The title by infest-  
 “ ment completed in the defender's person depended on the resignation  
 “ ad remanentiam by David, and must therefore be laid aside; for  
 “ though it might have been made effectual in another manner, this was  
 “ not done. Then, although it was held in the case of Livingston  
 “ against Lord Napier that a personal right might be entailed even  
 “ against creditors, it is to be observed that James Livingston, the insti-  
 “ tute or first substitute in that case, was not the heir even of the  
 “ personal right, and far less heir of any investiture. He had, therefore,  
 “ no other title. But, in the present case, the defender was the heir  
 “ apparent under Mr. Ferrier's disposition, and in the reversionary right,  
 “ under every view of his father's title. It would be at least a very  
 “ difficult matter to establish that his creditors are affected by such a  
 “ personal entail, consistently with the decisions in the case of Denholm  
 “ of Westshiell, and other similar cases, yet the Lord Ordinary is sensible  
 “ that there is considerable difficulty in this question. The procuratory  
 “ of resignation creating the entail simply designs the granter as heritable  
 “ proprietor, without reference to any particular title.

“ If the Lord Ordinary were to pronounce a judgment he would adopt  
 “ nearly the words of the first part of Lord Eskgrove's judgment in the  
 “ case of Ederline, and then find that David Campbell, not having been  
 “ divested by the trust deed, had power to execute the procuratory of  
 “ resignation containing the entail, and that the titles made up under it  
 “ were validly and effectually made up, and on this ground assolzie the  
 “ defender.”

<sup>1</sup> 9 S. & D., 55.

*Appellants.*—The infestment in the person of the trustee extinguished for the time the whole feudal right which had belonged to David Campbell, and that feudal right could not be revived except by a reconveyance from the trustee, completed according to the feudal forms. The question, how far a proprietor is divested of his feudal right by the granting of a trust-deed, has been agitated in the Court of Session at different times, and under different circumstances.

The appellants admit that as the infestment of Mr. Ferrier, the trustee, was never confirmed by the superior, David Campbell, in virtue of his original infestment, still retained the dominium directum of his estate, and that to the extent of the dominium directum or superiority the entail which he executed may be effectual. But in relation to the dominium utile, in which the trustee was expressly infest, the feudal title of David Campbell still subsisted, to the effect of entitling him to grant other effectual feudal conveyances of the same property. The powers of the trustee were not limited to ordinary acts of administration. He had the power of selling the lands in whole or in part, at such prices as he might think fit, without the advice or consent of the truster; he had also the power of granting dispositions in favour of the purchasers, and, being himself infest, he had the power of granting procuratories of resignation and precepts of sasine for rendering those dispositions feudally complete. The appellants are not aware upon what grounds in law it can be maintained, that adjudications of the same property can be led at the same time against different parties with equal effect; or, in other words, how it can be held that the entire right of property subsists in two distinct persons at one and

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the same time. In the Court of Session the Judges did not attempt to supply the defects, or to explain the apparent difficulties of the case of Campbell of Ederline.

The ground assigned in that case for sustaining the adjudication which was led against the heir of the truster, was, that the trust was created "for the granter's behoof," and it is easily understood, that a trust of that description may be so constituted as to impair in no degree the substantial right of the granter. A trust for the management of the granter's property defeasible at the will of the granter, and under which the trustee is responsible to the granter alone, may fairly be held not to impair the radical right of the truster. In like manner, a trust contained in a mortis causâ settlement, and the object of which is the distribution of the granter's estate amongst his gratuitous legatees after his decease, stands almost precisely in the same situation. Of this description was the trust-deed of the Duke of Roxburghe, alluded to in the Lord Ordinary's note. Down to the period of the Duke's death, the infestment by which he held his estates could not be affected by a deed, the effect of which was necessarily suspended until after his death. In fact he died infest in the subject in which Lady Mary and Lady Essex Ker might competently have made up a title to him by special service. A trust may be created either by a qualification expressed in the infestment of the trustee, or it may be created by a separate writing, or even by the simple acknowledgment of the trustee himself. The difference between those several species of trust may often be very important in questions with third parties deriving right from the trustee. But in questions between the truster and trus-

tee individually, it seems plain that, a trust being admitted or proved, the rights of the truster and trustee must be the same, whatever be the nature of the proof by which it is established.

The sustaining of adjudications, as competent against a truster, after conveying his property to trustees, falls short of deciding the question in this case, and it remains still to be decided what the effect of such adjudications is, and what right is thereby carried.<sup>1</sup>

*Respondents.*—The conveyance by David Campbell to Mr. Ferrier did not divest David Campbell of the radical right to the property, or put an end to the feudal investiture in his person. It was merely a conveyance in trust for a limited purpose—the payment of debts, and although it contained powers of sale, these powers were merely granted in explication of the trust, and are common in a mere conveyance in security. There was no intention on the part of either party that the lands should be given or taken in absolute satisfaction of the whole debts, or of any definite part of them, or should belong to Mr. Ferrier himself. The lands were merely placed under a certain controul for the immediate security and ultimate payment of the creditors, and even that controul ceased when the object was accomplished. Even if David Campbell had died without obtaining any reconveyance, his heir could have made up a valid feudal title to the lands by a service in special as heir of the investiture, or the creditors of

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<sup>1</sup> *Appellants Authorities.*—2 Stair, 11. 6; 2 Bell, 291–3; Munro, Jan. 27, 1756 (Supp. V. 310); 2 Bell, 496, and note; Fairley, July 11, 1827, 5 S. & D. 937; Douglas, Feb. 22, 1765 (15616); Russell, &c. Jan. 31, 1792 (10300).

No. 22. David might have adjudged the estate in hæreditate  
 14th August jacente. This was decided, in the case of Campbell of  
 1834. Ederline in 1801, and has been uniformly recognized  
 as settled law ever since.<sup>1</sup>

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LORD WYNFORD.—My Lords, this is an action of reduction and declarator, brought by the creditors of a person of the name of Campbell, to set aside a settlement of an estate which had been made by Campbell the father. The question for your Lordships is, whether Campbell the father, at the time of making that settlement, had a sufficient legal estate to enable him to make that settlement. The facts are these:—Campbell the father conveyed this property by a deed to a person of the name of Ferrier; and it appears that the object of the conveyance was to make Ferrier a trustee, for the purpose of paying creditors. If any part of the proceeds of the estate remained, he was to pay these proceeds back to Campbell the father, or if any part of the estate remained unsold, he was to reconvey that estate to Campbell the father. A part only of the estate was sold; the remainder the trustee intended to reconvey. He made a reconveyance, which the Judges in Scotland decided was imperfectly made, and consequently that no estate passed back by that conveyance. The question then is, whether Campbell the father—the estate having been conveyed, and there being no effectual reconveyance—was disabled from making a settlement of his property. If this case had occurred in England,

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<sup>1</sup> *Respondents Authorities*.—Campbell, Jan. 14, 1801 (Mor. v. Adjud. App. 11); Fairley, July 11, 1827, 5 S. & D. 937; Napier, March 3, 1762 (15418), and July 20, 1762 (Supp. V. 888); Carmichael, Nov. 15, 1810 (F. C.); Paul, May 28, 1828, 6 S. & D. 826.

undoubtedly Campbell the father would not have had such an estate as would enable him to levy a fine or suffer a recovery, because the legal estate was clearly out of him; but this is a case depending on Scotch law, and your Lordships, I should numbly hope, would be very careful how you reverse a decision of Scotch Courts, when proceeding either on the practice of pleading, or the practice of conveyancing; because it is quite impossible that persons in this country can be so conversant with that practice, or those forms of conveyancing, as the Judges of the Court of Session. This is a pure question of Scotch conveyancing; the only question being, whether, notwithstanding this conveyance, there was not, according to the understood law of Scotland, a sufficient legal interest remaining in Campbell to enable him to make this settlement. If he had been living in England, a Court of Equity, though he had made such a conveyance, would have compelled the person in whom the legal estate was, to complete his conveyance; it would have been imperfect at common law: but there is a great difference in the Courts of Scotland in that respect, for there is in that country but one Court exercising a jurisdiction of law and equity, and that may have led to the difference upon this subject. The Scotch Judges have decided that, notwithstanding this conveyance, as it appeared upon the face of the deed itself, it was a conveyance for the purpose of paying debts. We are not to hesitate to reverse, if we see that the law clearly requires it; but we must see that to be perfectly clear before we overturn the judgment of the Court of Session. This judgment appears to me to be consistent with equity, for this reason, that if the interest was not all disposed

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of, it belonged to Campbell, the original settler; and those who claim under him have a right to the disposal of it. A trustee holding under such a deed in this country would have been compelled to reconvey. What right, in equity, then, have the creditors of Campbell's son to come and claim? They can have no right but through the father; and if the father had made a strict settlement they ought not to be allowed to defeat that settlement. The settlement was made by the father, not for the benefit of immediate successors, but the benefit of the line of successors. The Scotch Judges have held, that in consequence of the deed to Ferrier the legal estate was out of the father, but that as it was conveyed to Ferrier for a particular purpose, enough of it remained in the father who conveyed, to enable him to make such a settlement as that before your Lordships. I consider this as a perfectly well decided case. In that which is laid down by my Lord Moncreiff, who was the Lord Ordinary in this case in the Court below, I would express my entire concurrence. His Lordship referred to two cases, which I cannot distinguish from the present, in which the same doctrine is asserted; the one of a settlement by a person of the name of Campbell, (a gentleman of the same name with the settler in the present case,) who conveyed his estate in nearly the same words, giving a power of sale, for the purpose of the estate being sold for the payment of debts. There was no reconveyance of that estate; but the Court, about thirty years ago, held that the person originally conveying had still the legal estate in him. This appears to me precisely the same with the present case. The words in which Lord Eskgrove delivered his judgment are certainly very

strong. In giving judgment his Lordship said, “ A conveyance such as this does not divest the granter of his feudal title, and is only to be viewed as a burthen upon the land;” those words are express,— “ the feudal title remains undisturbed in the settler of the property.” This cause was decided about thirty years ago, and was never appealed against to this House. If there was to be no law in Scotland except that settled by appeals to this House, there would be very little law indeed; but decisions acquiesced in are of great authority, as there is unquestionably a strong disposition on the part of the good lieges of Scotland, where they can find a good reason for appeal, to bring the case under the consideration of this House. It appears to me, therefore, that we must consider the judgment of the Court of Session in this case, so acquiesced in, as founded in law. In a subsequent case the same question came under the consideration of the Court, in the case of the Duke of Roxburgh, where a conveyance similar to the present was made and where it was held that the Duke of Roxburgh still remained the legal owner of the estate, and was entitled to make a legal conveyance of that estate as the legal owner. Here are, therefore, two decisions. Is there, then, any decision to oppose these; if not, then unquestionably the balance of authority which constitutes the rule of the Court in cases of this description being all on one side, your Lordships would be bound to affirm this judgment. The Lord Advocate, who has brought forward all the learning upon it which the books of law afford, has referred to one case,—the case of Sir Adam Fergusson of Kilkerran, who made a new feu of the lands of Drumellan to his brother, Lord

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Fergusson conveyed away his property. The question  
was, whether he was in a condition to make that conveyance, having previously made a conveyance to Lord Hermand. The Court of Session were of opinion that he was in no condition to do that, the legal estate having passed to Lord Hermand. But your Lordships will see the distinction between that case and this. In that case there was no object expressed, such as the payment of debts. In the present case there is the expression of that object, and the object ceases for which it was made; so that every one would see that it was not conveyed to him absolutely, but for certain purposes. A person claiming an interest, therefore, would be called upon, in the present case, to look and see whether those purposes were answered or not. In the conveyance to Lord Hermand by the brother there was nothing of the kind. It was a conveyance, probably, for love and affection, and was an absolute conveyance; and after the object for which it was conveyed was accomplished the estate was reconveyed, but the conveying it back appears to be an acknowledgment that that was a valid conveyance. The deed objected to being a deed executed between the first and the second conveyance, it appears to me it was impossible that that could stand. Lord Hermand had reconveyed it before the death of his brother, and from that moment Sir Adam Fergusson would have been in the legal possession of the estate; but a reconveyance after a certain deed had been made could not give validity to that deed; and there is a manifest difference between these two cases. A person looking at that

deed could not possibly have said that a scintilla of interest, either in law or in equity, remained in the legal owner of the estate. This is the only case which has been attempted to be brought to bear upon this case. It appears to me there is a manifest distinction between the two cases; therefore, upon the weight of authority, as has been already stated by the learned Judges of the Court of Session, it appears to me we are called upon to affirm this interlocutor. I shall therefore humbly advise your Lordships to affirm it, and I should humbly advise your Lordships to affirm it with costs. I never recommend to your Lordships to give what are called vindictive costs; they should never be given by way of punishment, for that is preventing the party doing that which, by the law of this country, he has a right to do; but if a person thinks proper to appeal, he ought to do it at his own expense, and not at the expense of the other party; that is strict justice between man and man. I know it has been usual to mention a particular sum, but I understand from one of your Lordships officers, from whom we are in the habit of receiving great assistance, that that practice has been lately departed from in some cases. I very much approve of that departure. I feel that it is desirable, before your Lordships decide what you should give in the shape of costs, that you should be informed what the costs actually amount to. I shall therefore humbly recommend to your Lordships to postpone the consideration of the question of costs, desiring, at the same time, that the agents for the respondent will submit to the officer of the House their bill, that the officer of the House may inform your Lordships on another day as to the amount. I shall therefore now

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 M<sup>c</sup>MILLAN  
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No.22. only humbly move your Lordships, that the judgment  
of the Court below be affirmed.  
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M'MILLAN  
and others  
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and others.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor, so far as therein complained of, be, and the same is hereby affirmed : And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of one hundred and seventy-one pounds for their costs in respect of the said appeal.

DAVID CALDWELL, Solicitor.

[30th May 1834.]

Sir CHARLES ABRAHAM LESLIE, Appellant.

No. 23.

ALEXANDER SHEPPERD, Respondent.

*Bill of Exchange.*—After a bill had been protested, and diligence executed against the drawer and acceptor, at the instance of an onerous indorsee, a party, at the request of the acceptor, retired it by granting his own bill at six months, but stipulated for an assignation to the bill and diligence:—Held, that he had recourse against the drawer after he had been obliged to retire his own bill, and that this was not barred by the acceptor of the original bill being allowed time, till the new bill fell due, to provide funds for retiring the original one, without any communication with the drawer.

THE appellant, Sir Charles Leslie, on the 17th September 1825, drew a bill on Thomas Mackenzie Paterson for 100*l.*, payable three months after date, and which Paterson accepted for value. This bill the appellant indorsed, also for value, to James Thomson, who was his ordinary law agent. When the bill fell due it was dishonoured, whereupon it was protested, at the instance of Thomson, against both Paterson and the appellant, and they were charged on letters of horning, denounced, and caption issued. On the day following the denunciation Paterson wrote to Thomson, asking for a delay in payment for six months, on condition that the respondent Shepperd would either sign or guarantee a bill for the amount. Thomson answered, that he would take Shepperd's bill, as proposed, provided it were

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Ld. Mackenzie.

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immediately sent to him. After some correspondence between Thomson and Shepperd, the latter wrote, that although he was already under heavy engagements for Paterson, yet, as he thought his affairs were now in a fair train of arrangement, he would accept a bill, provided it did not exceed 100*l.*, and adding, "I presume you will have no objection to give me an assignation to the bill, and diligence, at my own expense." In consequence of this letter, Thomson on the following day drew a bill on Shepperd for 99*l.* 19*s.* 4*d.*, and he sent at the same time Paterson's bill, with the diligence, of which he promised to grant an assignation when required. Shepperd thereupon accepted and returned the bill to Thomson, payable six months after date. No notice of these proceedings was given to the appellant, and no farther steps were taken on the diligence against him at this time, nor at all against Paterson. The latter having failed to retire the original bill, Shepperd was obliged to pay the one granted by him, when it fell due. He then required, and obtained, from Thomson, an assignation to the original bill, and diligence, both against Paterson and the appellant. Intimation of this assignation was sent by letter to the appellant, but he alleged that he had never received it. In 1829 Shepperd gave a new charge on the diligence to the appellant, who presented a bill of suspension, which was passed, in which he alleged, 1. That Shepperd had interposed merely as a friend of and to protect the true debtor, Paterson, with whom he was engaged in various pecuniary transactions, as to the purchase of land and otherwise, and having done so for his honour alone, he could make no better claim against

the appellant than Paterson himself could have done \* ; and that accordingly the amount of the bill was put to Paterson's debit in account with him. 2. That in point of fact the value with which Shepperd's own bill had been retired belonged to Paterson ; and, 3. That at all events, as by Shepperd's interposition time had been given to Paterson for six months, without the consent of the appellant, the latter was discharged.†

In answer, Shepperd denied the allegations on which the two first pleas rested ; and stated, that while he no doubt was desirous to befriend Paterson, and enable him to wind up his affairs free from diligence, he had granted his bill expressly on condition that he should receive an assignation to the diligence against the appellant, in security of his relief ; and he maintained that the allegation of having given time was, under the circumstances, and more especially as ultimate diligence had been raised both against the appellant and Paterson, of no relevancy ; that it was clear Thomson was entitled to take the respondent's bill, and if so, then, as the respondent was his assignee, he could not be in a worse position than Thomson.

The Lord Ordinary suspended the letters, on the ground that time had been unduly given to Paterson. The respondent having reclaimed, and the Court, being of opinion that the interlocutor was erroneous on the ground on which it was placed, made a remit, before

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\* Bayley on Bills, 328 ; Thomson on Bills, 498 ; Johnston v. Robertson, 2d Feb. 1830, 8 S. & D. 430.

† Chitty on Bills, 299 ; Thomson v. Forrester, 18th June 1824 ; 2 Sh. App. Ca. 317 ; Hume v. Youngson, 12th Jan. 1830, 8 S. & D. 295 ; Thomson on Bills, 580 ; Stirling v. Forrester, 13th June 1821 ; 1 Sh. App. Ca. 37 ; Moubray v. White, 17th June 1824, 3 S. & D. 146 ; Allan and Son v. Laidlaw, 3d Dec. 1834, 3 S. & D. 336.



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farther answer, to an accountant, to report ;—1. Whether or not Shepperd's acceptance to Thomson had been retired with the money and means of Paterson; 2. Whether there was any account in process on the charger's books which imported that the acceptance had been retired with Paterson's money or means; 3. Whether, when it fell due, Shepperd had money or means belonging to Paterson sufficient to retire it. 4. Whether, if not so, any funds afterwards came into his hands which he was bound to apply in extinction of any claim competent to him on that acceptance.

The accountant reported in the negative on all these points, but stated, that, after retiring it from his own funds, Shepperd put it to the debit of an account against Paterson, in whose favour there arose a balance due on the face of that account; but Shepperd was then and still was under heavy obligations for Paterson; and he left it to the Court to decide, " Whether the charger, " having retired the said acceptance from his own " funds, and entered it to Paterson's debit in a particular " account, the balance of which came by subsequent " transactions to be in favour of the latter, is or is not " thereby precluded from proceeding against the co- " obligant in that bill, keeping in view that Paterson " was all along and still is under other obligations to " the charger to an amount greater than the balance in " his favour of the account in question at any period of " its currency."

The Court, being of opinion that Shepperd was not precluded, altered (22d February 1833) the interlocutor, and found the letters orderly proceeded, with expenses.\*

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\* 11 S. & D. 436. At page 439, line 7, for Thomson read Shepperd.

The appellant entered an appeal, and pleaded on all the grounds maintained by him in the Court of Session. But —

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of one hundred and seventy-eight pounds fifteen shillings and sixpence, for his costs in respect of the said appeal.

ALEXANDER DOBIE — JOHN MACQUEEN,  
Solicitors.

[14th June 1834.]

No. 24. WILLIAM PAUL, Accountant in Edinburgh, Appellant.

ARCHIBALD GIBSON, Accountant in Edinburgh,  
Respondent.

- Bankruptcy — Sequestration.*—1. Held (affirming the judgment of the Court of Session) that in a competition for the office of trustee on a sequestrated estate, it is not a relevant objection to allege that a claim is suspicious, and that the claimant has an interest adverse to the other creditors, and may have the sole command of the estate and control of the trustee.
2. A claimant, who was so situated as to be unable to make any other oath than that a sum was due to him, according to the best of his knowledge and belief, but without prejudice to augment or restrict the sum afterwards,—Held (affirming the judgment of the Court of Session) entitled to vote for a trustee.
3. Where a party made affidavit to a precise sum as being due, and was so situated as not to require, *hoc statu*, to produce a voucher,—Held (affirming the judgment of the Court of Session) that his founding on a deed, in support of his claim, did not vitiate his vote, although the deed did not support the claim made, but was at variance with it.
4. A party, in emitting an affidavit, having deponed that he could not write, and the oath being signed by the magistrate,—Held (affirming the judgment of the Court of Session) that there was no need of a signature by notaries for the party.

5. *Husband and Wife*.—A married woman, whose husband was abroad under sentence of transportation, having been found entitled to pursue an action of count and reckoning, with concurrence of a curator ad litem, and the defender's estates being sequestrated,—Held (affirming the judgment of the Court of Session) that she was entitled to vote in the election of a trustee, without her husband's concurrence.

**T**HOMAS ANDERSON died in Jamaica on the 2d January 1810, unmarried, leaving two brothers, John and Alexander, and a sister Margaret, who was married to Alexander Bain. He had made a will, by which he nominated his brother John, who resided in Jamaica, and Alexander, who resided in Scotland, with another person, to be his executors. After certain provisions, the will concluded thus: “The remainder I give  
 “ and bequeath unto my dear and affectionate sister  
 “ Margaret Bain, or brother Alexander Bain if he sur-  
 “ vives her, my dear and affectionate brother Mr. Alex-  
 “ ander Anderson, or his present lawful wife if she  
 “ survives him, each to draw a moiety of the yearly  
 “ interest during their natural lives, for their accom-  
 “ modation and family; and after their deceases or  
 “ decease, that brother Alexander and sister Margaret's  
 “ children, with brother John Anderson's daughter  
 “ Eliza Anderson, a free Mustee girl, have each a divi-  
 “ dend of the interest, and may draw equal shares of  
 “ the capital, as they become of age.”

1ST DIVISION.  
 Lord Moncreiff.

John qualified as executor, and it was alleged that he intromitted with the property of Thomas to a large amount. John died on 28th December 1818, leaving a will, by which he appointed William Shand, and another person, his executors; but it was alleged that

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Shand alone qualified and acted. By this will, after directing payment of his debts, he made, inter alia, the following bequests: “ I give and bequeath unto my dear sister Margaret, the wife of Alexander Bain of the county of Moray, in that part of the United Kingdom of Great Britain and Ireland called Scotland the sum of 1,000*l.* sterling money of Great Britain, the same to be equally divided between herself and such of her children as may be living and residing in Scotland aforesaid at the time of my decease. Item, I give and bequeath unto my nephew William Bain, of the parish of Clarendon aforesaid, planter, son of the aforesaid Margaret and Alexander Bain, the sum of 500*l.* current money of Jamaica. Item, I give and bequeath unto my reputed daughter Eliza Anderson, now residing in the city of Bristol, the sum of 1,000*l.* sterling money aforesaid; but in case of her death and leaving lawful issue, then and in such case I direct the same shall be divided between them, if more than one, share and share alike; but if only one child, then to such only child. Item, I give and bequeath unto my other reputed daughter Ann Anderson, now residing with me, the sum of 1,000*l.* sterling money aforesaid; but in case of her death, and leaving lawful issue, then and in such case I direct that the same shall be divided between them, if more than one, share and share alike; but if only one child, then to such only child; which said two last-mentioned legacies I do hereby direct shall be paid as soon after my decease as may be convenient to my executors.” He then left some additional legacies, and concluded thus: “ And as to all the rest, residue, and remainder of my estate, real and personal, I give, devise, and bequeath

“ the same and every part thereof unto my said brother  
 “ Alexander Anderson senior, for and during the term  
 “ of his natural life ; but subject nevertheless, and my  
 “ will and mind is, that my said brother Alexander  
 “ Anderson do and shall, after payment and satisfaction  
 “ of the debts and legacies here before mentioned, pay  
 “ unto each of his children that may be then living, the  
 “ sum of 200*L*. sterling money of Great Britain ; but in  
 “ case of his death without payment of the said last-  
 “ mentioned legacies, then and in such case I do hereby  
 “ direct that the same shall be paid by such other person  
 “ as shall become entitled to and be in possession of the  
 “ residue of my estate ; and from and immediately after  
 “ the decease of my said brother Alexander Anderson,  
 “ I give, devise, and bequeath the same and every part  
 “ thereof unto Alexander Anderson junior, son of the  
 “ said Alexander Anderson senior, for and during the  
 “ term of his natural life ; and from and immediately  
 “ after the determination of that estate, I give, devise,  
 “ and bequeath the same unto the eldest son of the said  
 “ Alexander Anderson junior, lawfully to be begotten ;  
 “ but in default of such issue then living, then and in  
 “ such case I give and bequeath the same unto the next  
 “ eldest son that may be living of the said Alexander  
 “ Anderson senior, to him and his heirs for ever law-  
 “ fully begotten ; but in case no such son shall then be  
 “ alive, then I give and bequeath the same unto my  
 “ said two reputed daughters named Eliza Anderson  
 “ and Ann Anderson, to them and the survivor of  
 “ them, and to the heirs and assigns of such survivor  
 “ for ever ; but in default of such heirs, then to the  
 “ heirs of my said sister Margaret, their heirs and  
 “ assigns for ever.”

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It was alleged that Shand, as executor of John, intror-  
 mitted to a large amount not only with John's proper  
 estate, but also with that of Thomas, without rendering  
 any account. Shand afterwards came to Scotland, and  
 in 1829 Margaret Anderson or Bain (the sister), who  
 had survived her husband, her daughter Elspet, wife of  
 one Garrow, a convict under sentence of transportation,  
 the widow of Alexander (the brother), and three of his  
 children, as legatees and next of kin of Thomas and  
 John, raised an action of count and reckoning before  
 the Court of Session against Shand, as intrormitter with  
 the two estates. A curator ad litem was appointed by  
 Elspet, and, on the dependence, inhibition and arrest-  
 ment were executed. The estates of Shand were seques-  
 trated in September 1833, whereupon Margaret and her  
 daughter Elspet, and the widow of Alexander, and her  
 three children, made affidavits, and lodged claims as  
 creditors. The affidavit of Margaret was in these (and  
 the others were, mutatis mutandis, in similar) terms:

“ At Forres, the 18th day of September 1833.—In  
 “ presence of Alexander Urquhart esq., one of  
 “ the bailies of the royal burgh of Forres,—  
 “ Compeared Margaret Anderson, relict of the de-  
 “ ceased Alexander Bain, day-labourer at Altyre in the  
 “ county of Moray, and who was one of the representa-  
 “ tives, legatees, devisees, or residuary legatees, and  
 “ nearest of kin to the deceased Thomas Anderson,  
 “ late of the parish of St. John's, county of Middlesex,  
 “ and island of Jamaica, her brother-german, and who  
 “ was also one of the representatives, legatees, and devi-  
 “ sees, or residuary legatees, and nearest of kin to the  
 “ also deceased John Anderson, late of Clifford in the  
 “ parish of Clarendon in the county and island afore-

“ said, also her brother-german; who being solemnly  
 “ sworn, examined, and interrogated, depones, that  
 “ William Shand esq., of Arnhall in the county of Kin-  
 “ cardine, merchant and trader, was, at the time and date  
 “ of the sequestration awarded against him, and is still,  
 “ justly indebted, resting, and owing to the deponent, as  
 “ legatee and devisee, or residuary legatee, under the last  
 “ will and testament of the said deceased Thos. Anderson,  
 “ and as one of his representatives and nearest of kin as  
 “ aforesaid, and as relict of the said deceased Alexander  
 “ Bain, the sum of 14,498*l.* 14*s.* 2*d.* sterling, being her  
 “ share of the aggregate sum of 43,496*l.* 14*s.* 2*d.* ster-  
 “ ling, arising from the intromissions of the said William  
 “ Shand with the estates and effects of the said Thomas  
 “ Anderson, lying in the island of Jamaica, conform to  
 “ state subscribed by the deponent as relative hereto:  
 “ As also depones, that the said William Shand is also  
 “ justly indebted, resting, and owing to the deponent,  
 “ as a legatee and devisee, or residuary legatee, under  
 “ the last will and testament of the said deceased John  
 “ Anderson, and as one of his representatives and  
 “ nearest of kin, in manner foresaid, and as relict of the  
 “ said deceased Alexander Bain, her husband, the sum  
 “ of 2,848*l.* 10*s.* 10*d.* sterling, being her share of the  
 “ aggregate sum of 8,545*l.* 2*s.* 6*d.* sterling, arising from  
 “ the intromissions of the said William Shand with the  
 “ estates and effects of the said deceased John Ander-  
 “ son lying in the said island of Jamaica, conform to  
 “ state subscribed by the deponent as relative hereto,  
 “ making together the sums claimed by the deponent  
 “ in her own right, the sum of 17,347*l.* 5*s.* sterling,  
 “ upon the premises assumed and founded on in the

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“ process of count and reckoning depending before the  
 “ Court of Session, at the instance of the deponent and  
 “ Elspet Bain, her daughter, against the said William  
 “ Shand; nevertheless, without prejudice to the depo-  
 “ nent to augment or restrict her claim hereafter as she  
 “ may see proper for any cause: Farther depones, that  
 “ neither the deponent nor any other person on her  
 “ account and behoof, hold any other security for the  
 “ foresaid sums than an action and process of count  
 “ and reckoning, presently depending before the Court  
 “ of Session, at the instance of the deponent and Elspet  
 “ Bain, her daughter, against the said William Shand,  
 “ and letters of inhibition and arrestment raised at their  
 “ instance on the dependence of the said action, with  
 “ the executions, inhibition, and arrestment following  
 “ thereon; and that no part of the said sums has been  
 “ paid or compensated in any manner of way. All  
 “ which is truth, as the deponent shall answer to God:  
 “ Farther depones, that she cannot write.

“ *Alex. Urquhart, B.*”

The state referred to was entitled “State of the  
 “ claims and interest, at the instance of the represen-  
 “ tatives, legatees, and nearest of kin of the deceased  
 “ Thomas Anderson, late of the parish of St. John,  
 “ county of Middlesex and island of Jamaica, and of  
 “ the also deceased John Anderson, late of Clifford in  
 “ the parish of Clarendon, and county and island afore-  
 “ said, against William Shand esq., of Arnhall in the  
 “ county of Kincardine in Scotland, for the said William  
 “ Shand’s intromissions with the estates of the said  
 “ Thomas and John Anderson.”

A specification in detail of the claim in respect of

each of these estates was then given, and the state concluded thus:—

APPORTIONMENT.

|                                      | The estates of<br>Thomas Anderson. |    |    | The estates of<br>John Anderson. |    |    |
|--------------------------------------|------------------------------------|----|----|----------------------------------|----|----|
|                                      | £                                  | s. | d. | £                                | s. | d. |
| “ 1st. Alexander Anderson’s family - | 43,496                             | 2  | 6  | 8,548                            | 11 | 5½ |
| Whereof one third to the relict      | 14,498                             | 12 | 2  | 2,848                            | 2  | 10 |
| For the children two thirds -        | 28,997                             | 8  | 4  | 5,700                            | 8  | 7½ |
| “ 2d. Alexander Bain’s family - -    | 43,496                             | 2  | 6  | 8,548                            | 11 | 5½ |
| Whereof one third to the relict      | 14,498                             | 14 | 2  | 2,848                            | 2  | 10 |
| For the children two thirds -        | 28,997                             | 8  | 4  | 5,700                            | 8  | 7½ |

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Forres, 18th September 1833. This is the state referred to in our respective affidavits against the sequestrated estate of William Shand esq., of Arnhall, emitted this day.

It was signed by notaries for Margaret, and by the other parties themselves. The total claims by them amounted to above 104,000*l.*

A competition having taken place for the office of trustee between the appellant Paul and the respondent Gibson, Margaret Anderson and others voted for the respondent, while creditors, to the amount of about 2,900*l.*, voted for the appellant. Both presented petitions for confirmation, and mutual objections were ordered to be stated. The respondent made no objections to the votes for the appellant, but the latter objected to all the votes for the respondent.

These objections rested partly on general grounds, and partly on particulars. The general objections were, —1, that the claims were fictitious, were contradicted by the wills and evidence produced, and were of a random and extravagant character; 2, that they had been got up by near relatives having a hostile interest to the other onerous creditors, and in order to enable them to have an entire control over and guidance of the trustee.

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The respondent answered by denying the truth of the allegations on which these objections were founded, but that at all events they were, in the question of voting for a trustee, premature and irrelevant.

The particular objections were,—1st, that the affidavits were merely of credulity, and not of verity, as required by the statute, seeing that they did not bear that any debt was truly due, but only “upon the premises assumed and founded on in the count and reckoning,” and they were not definite, because the affidavits were made “without prejudice to augment or restrict the claim hereafter;” 2d, that the claims were not consistent with the wills, and were made up on principles at variance with the provisions; 3d, that Margaret’s affidavit was not subscribed by herself or by notaries; and, 4th, that although Elspet’s husband was a convict, yet his goods had not been escheat, and the claim made by her belonged to him; that she had therefore no title to claim, and the concurrence of the curator was of no avail in the sequestration.

The respondent answered,—1st, that the oath expressly showed that a debt was due, and reference was merely made to the action of count and reckoning, to point out the grounds on which the claimants held the debt to be due; that in hoc statu they must be assumed to be true, and it was quite competent, in the peculiar circumstances of the case, to reserve a power to augment or restrict the claims; 2d, that even if there was any inconsistency between the claims and the documents referred to this was at present of no relevancy; but there was no inconsistency, as the claimants claimed both as legatees and next of kin of Thomas and John; 3d, that the signature of the magistrate to the affidavit was

sufficient, seeing Margaret deponed that she could not write; and, 4th, that as Elspet's title had been sustained in the action of count and reckoning she was entitled to make the affidavit and claim in concurrence with her curator.

Lord Moncreiff reported the case to the Court, with this note: "There is an evident necessity for reporting  
 " this competition. It would require a very minute and  
 " extended statement to exhaust all and each of the  
 " objections, and the points of fact and law involved  
 " in them. The Lord Ordinary will only, therefore,  
 " observe in general, that it appears to him that the  
 " objections are insuperable; and, in particular, that  
 " no good answer has been made to the three first ob-  
 " jections. There is no doubt that the same accuracy  
 " and completeness in the evidence of the debt is not  
 " required in a question as to the right of voting, as in  
 " the ultimate question of ranking, and that objections  
 " which might be good in the latter case will not be  
 " good or relevant in the other. That distinction re-  
 " quires no enforcement; but it does not appear to  
 " the Lord Ordinary to settle the present case. The  
 " first question is, whether the affidavit is sufficient as a  
 " positive oath to a debt of defined amount, without  
 " condition or qualification; and the second is, whether,  
 " on the face of the affidavit, and the account or voucher  
 " necessarily produced in support of it, the one agrees  
 " with the other, so as to show the same specific debt  
 " as due to the individual claimant. It is entirely a  
 " different and separate question, by what evidence,  
 " apart from the affidavit and voucher produced, the  
 " claim may competently be shown to be unfounded or  
 " incorrect. In the present case the Lord Ordinary  
 " thinks that the claims fail in the two first points;

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“ and he will only farther observe, that however just  
 “ and expedient it may be that the Court should not in  
 “ general be required to go into the question as to the  
 “ actual verity of the debts, where the affidavits and  
 “ vouchers are clear, positive, and consistent, yet,  
 “ where on the face of those documents the claims are  
 “ so manifestly uncertain, and made of any given  
 “ amount at mere random conjecture, as he thinks they  
 “ are in the present case, it is a question of very se-  
 “ rious importance whether the whole command of the  
 “ business of such a sequestration may be assumed by  
 “ parties resting upon such hypothetical, uncertain, and  
 “ conditional claims. It may be of little consequence  
 “ here which of the two competitors for the office of  
 “ trustee shall be preferred, both being known to the  
 “ Court to be equally respectable; but there are cases  
 “ in which the principle might lead to serious evils,  
 “ even in that point.

“ The Lord Ordinary does not enter into the more  
 “ particular objections; but many of them seem to  
 “ require careful attention, if the general objections  
 “ should not be thought to be made out.”

The Court, on the 14th January 1834, repelled the objections stated to the election of the petitioner, Archibald Gibson, and confirmed his nomination as trustee.\*

Paul thereupon appealed, on the same grounds which he had maintained in the Court below.

LORD CHANCELLOR.—My Lords, in some respects I consider this question to be of no ordinary importance.

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\* 12 S. & D. 431.

I cannot help thinking that if appeals are to be allowed in a case like this, there will hardly be any litigation not encouraged; if we are not only to encourage proceedings in the Court of Session upon a question of the choice of a trustee, but, after it shall have run the gauntlet of litigation in that Court, if we encourage appeals to this Court, of the last resort, from the decision of the Court below, a more fruitless, a more useless, on the one hand, and on the other a more dilatory, and therefore oppressive, course of administration of the bankrupt laws can hardly be imagined. Of two persons, both undeniably men of respectable character and station,—both admitted to be, without dispute, persons of competent skill to manage the affairs of the estate, which of such two persons shall ultimately manage those affairs to the exclusion of the other is one of the least important matters that can possibly be suggested to the great object in view,—namely, the careful, skilful, reasonably skilful, and perfectly honest and impartial distribution of the bankrupt's estate. The law of Scotland, differing from the law of England in this respect, has applied various regulations to the administration of such estates. In the first place, the leading and cardinal difference between our bankrupt law system and theirs, and which pursues the whole arrangement of those concerns, is, that instead of making a man, as we do, a bankrupt behind his back, and by the merely ministerial act of the great seal and of certain commissioners by the great seal appointed, now by the Crown rather, since the new law,—he is in Scotland appointed by a sentence in a case in which he is a party, and which sentence he has a right to resist; the judges in that case, who give forth that sentence, being the Su-

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preme Court of Judicature of the country. That court is therefore the commissioners of bankrupts, besides having that leading and characteristic distinction in the mode of exercising the bankrupt jurisdiction, that it does not act *ex parte*, but in *foro contentioso*, on hearing the parties and on cause shown. That court is the commissioners of bankrupts also from the beginning to the end; but they are not in our sense of the word, though, at first sight, the use of the word may import into the question some little obscurity and confusion; but the Court of Session are the commissioners and the great seal at once. From them proceeds the adjudication; to them all applications are made in the course of the sequestration, as with us formerly to the great seal, now to the court of review in the first instance, and only by appeal on matter of law afterwards to the great seal. That is the great cardinal distinction between the two systems, and it gives rise to various important observations, some of which are not inapplicable to the structure of the law as regards the present question, and by which the present question is to be decided.

Another and a very great distinction between the two systems has been adverted to from the bar; and I have thrown out an opinion, not a casual one, but a deliberate one, which I have long entertained, upon the structure of that branch of the Scotch bankrupt law. With us the creditors choose the assignee, who is to become, as the trustee is in Scotland, the administrator of the estate for the benefit of the whole. In Scotland the creditors also choose the assignee; but whereas with us the assignee once chosen can only be removed by application to the court, and upon cause

shown, and for something which entitles the court to remove him, in Scotland, the creditors who choose have a right to displace him without applying to the court; although it is true there may be an application to the court, on a certain proportion of the creditors joining to make it,—I think it is one fourth by the 71st section,—to have him removed on cause shown. He is thus an instrument in their hands to all intents and purposes; from them proceeded his existence; they were his creators; from them may also at any moment,—without ground, without cause shown, without the necessity of alleging any one single word of a reason,—proceed that fiat which is to take the breath out of his nostrils, and to destroy his existence as a trustee.

My Lords, I will venture to say, without the least fear of contradiction, that speaking with all possible, with all due deference of an act of the legislature which stands unrepealed on the statute book; that is to say, speaking with all the respect of it which it is possible for a rational person to feel for such an act of the legislature, and with all the respect which is due to an act of that kind, meaning by that all due and all possible respect,—I will venture to say, within the limits of that respect, that there never was a provision of law less calculated to do justice amongst the parties, or to accomplish the object of the bankrupt laws,—the equitable and just and honest administration of the bankrupt's estate and effects,—than this to which I have now adverted. For, see the consequence: I am a creditor to the amount of a bare majority in value; for it does not require four fifths to choose; a bare majority creates a trustee, and a bare majority destroys him. There is an estate to the amount of 100,000*l.* of debt. I have a claim of 51,000*l.* as a

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creditor in my own person, which is a very possible case, and may happen any day. I choose my trustee, who is then accountable, not to the Court or to God and his own conscience, but who is accountable to me, the interested party; and if he does not give me every possible facility in proving my debt against the estate, I have only to give fourteen days notice in the *Edinburgh Gazette*. I hold a meeting, and if nobody attends that meeting but myself,—and I may hold it on a day that is convenient to me, and inconvenient to every other creditor,—I hold that meeting on that notice, and I remove my creature, my instrument, my tool whom I have created for the purpose of working my iniquitous work. I am assuming that that is my intention, and I am showing that if I have that intention I may execute it also. How are the other creditors likely to be off? If he has an interest in aiding me who am his maker, and may be his destroyer at any moment,—if he has an interest in giving me ample facilities to prove my debt,—he has just the same interest, and there is just the same likelihood that he should operate in the opposite direction towards all the other creditors; and in order to give me a larger dividend, namely, 20s. in the pound, that he may not give one farthing in the pound to any of the other creditors representing 49,000*l.* Now that may or may not be the operation of the law, or may or not be the law in Scotland; but reading the 71st section with all possible attention, I have not been able to discover any possibility of answering that argument which arises on that section. If any thing could be more remarkable than the structure of this legislative provision itself, it would be the very extremely inartificial and untechnical frame in which this strange

enactment is conveyed to the subjects who are to obey it, and who are to be cheated and oppressed under the colour of it. It proceeds in the beginning artificially enough, and it sounds like an act of parliament; it is of a statutory aspect; but see how soon it gets over that, and becomes to be rather more like a memorandum in a pocket-book, or a paragraph in a newspaper. I will read it for that purpose; it shows that it does not appear to have been thoroughly weighed, digested, and considered:—“ And be it enacted, that the interim  
 “ factor, sheriff clerk, and the trustee and commis-  
 “ sioners, or any of them, shall at all times be amenable  
 “ to the Court of Session, by summary application to  
 “ that Court, to account for their intromissions and  
 “ management, and to answer for their conduct, at the  
 “ instance of any party interested; and in case it  
 “ shall appear to the Court that such application ought  
 “ not to have been made, the party complained of shall  
 “ be entitled to his costs, to be either retained out of the  
 “ funds or recovered from the party complaining, as the  
 “ Court shall direct, but otherwise the Court shall give  
 “ such directions in regard to costs as they shall think  
 “ fit.” Now it is all proper until you come down to here; “ and it shall be competent,” (this is technical enough still) “ at any time for one fourth of the cre-  
 “ ditors in value to apply summarily to the Court  
 “ of Session for having the said interim factor or  
 “ trustee removed, upon cause shown; a majority of  
 “ creditors in value, at any meeting to be advertised for  
 “ the purpose, shall likewise be entitled to remove or  
 “ to accept of the resignation of any trustee; and in  
 “ either of these cases, or in the event of the acting  
 “ trustee’s death, the next trustee in succession shall be

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No. 24. "entitled to act." Why it has not even the common  
 14th June decorous covering of even the ordinary technical phraseo-  
 1834. logy of an act of parliament; and yet in such vague  
 PAUL and loose language is introduced one of the most  
 v. important defects, I will venture to say, in the whole  
 GIBSON. constitution of bankruptcy in Scotland.

My Lords, it is not immaterial that I should call your Lordships attention, and that of the learned counsel the Lord Advocate, who is now at the bar, and does me the honour of attending to what I am stating on this subject, because I do hope that as the frame of the Scotch bankrupt law is now undergoing revision, with the intention of passing a new bankrupt act, in the hands of Professor Bell and others in Scotland,—I do hope that the Lord Advocate will do me the favour not to allow this new bankrupt act to pass through without very carefully attending to the structure of this branch of the 71st section, for the purpose of seeing whether there be any necessity in Scotland,—whether the nature of traders, creditors and debtors, and trustees in Scotland be so different from what it is every where else, as to make it reasonable, or even tolerable, that this provision should continue on the face of this statute.

Well, my Lords, such being the provision of the bankrupt law, I must observe that a great portion of the argument, in the reply, seemed to me rather to be directed legislatively against the expediency and consistency of this provision of the statute, than judicially against the ground of the decision which was to be come to; because, although it is very true that the case of a single creditor, or one of two creditors, affords the strongest illustration of the absurdity of this provision of the Scotch bankrupt law, yet it must be

admitted that even under any assumption, even if you take the other trustee chosen by the other creditors, upon any principle you can take it, there is the same objection, and it is applicable to the same argument, and the same iniquity may be perpetrated under it, and the same absurdity may be justly attributed to it. It is worse, perhaps, in this case than it would be in the other case; but no view of the case, no way in which the trustees can be chosen, and no trustee who is elected, can be said to leave the case free from this grave and radical objection. If a great number of creditors have all combined, no doubt every one of those has a power pro tanto of making the majority to remove the creature of his choice; consequently, for all those who have chosen, he has the benefit, be they one or fifty; he has the interest, I mean, in keeping himself from being removed, by allowing them to prove their debts; and, be it one or fifty, he has the same interest in preventing them proving their debts, because his business must be if he has a profitable office, and it is always profitable, because the commissioners are appointed by the same creditors, who are to award him a compensation for his trouble. He, therefore, has an interest in keeping down the claims of those who opposed him, the opposite party; of letting in claims, and substantiating and allowing them to substantiate the claims of those who are his supporters, and who will cease to support him if he ceased to oppose them, because, if their debts are destroyed by their claims being rejected, the party comes in, removes him, and sets up another in his place; away goes he, and in comes the other. Therefore, my Lords, I am not greatly moved, though greatly in a legislative point of view,—yet in a judicial sense I am not greatly moved by this argu-

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ment, either as to the power of removing a commissioner or as to the power of approval of a trustee. Now, it is very true that all these considerations may tend to make us sift more accurately what the grounds of the title to choose, being also the ground of the title to amove, have been, and in that sense I do not deny they are entitled, on the part of the appellant, to the benefit of it. Now comes the question which we are to consider, whether the oaths of those persons contain that which is a compliance in substance and effect, if not absolute literal or verbal compliance, with the requisites of the statute in the 23d and 24th section, somewhat modified by the 64th section.

My Lords, upon the best attention I can give to those affidavits, I am of opinion that as on the one hand it is perfectly clear, that if three or four words had been left out you would not have objected to them at all, so I conceive on the others all you have to attend to is, what the Court below had mainly to attend to, namely, to see whether the introduction of those words vitiates the whole so as to make these no longer affidavits within the twenty-third section. They are clear affidavits of debt, which the parties have taken on themselves to make, but they do refer to the ground on which they have sworn, whether it be of virtue or credulity. Can I be said the less to swear to a fact, if I refer to the reason I have for swearing it either in the one case or the other?

My Lords, I have paid great attention to the arguments, and taken a full note. I have examined the opinions of the Learned Judges; I do not quite agree with the notion that Lord Balgray is the only judge who has gone into the case, for I think that the Lord President has gone rather fully into the case, though he

states shortly and decidedly his opinion on the subject. I see nothing to stop me moving at present, that this judgment should be affirmed, except the very great and very important and highly to be respected authority of Lord Moncreiff, who is undoubtedly of a different opinion; but except for that, and for the respect which I do unfeignedly feel for the opinion which proceeded from that most able and enlightened lawyer, and most active, intelligent, and dignified judge, who never omits any consideration, though he never overloads his opinions with any thing superfluous, and upon whose judgments it is your Lordships practice, generally speaking, to place a more than ordinary degree of reliance whensoever they appear before you; except for that, and for the respect I am bound to pay to such an authority, I myself should have no hesitation in saying, I differ with his Lordship and agree with the whole of the Court, who reversed his decision. Impressed with these sentiments, and following the practice which I am generally wont to adopt on these occasions when a discrepancy of so important a nature is to be found in the opinions of the Court below, I shall not move at present to affirm this judgment. I shall examine the matter more fully, with the assistance of the notes I have taken of the Learned Counsels argument. If I shall continue to be of the opinion I am at present, that the Court below is right, and that Lord Moncreiff's opinion is not sufficiently well founded, I shall move your Lordships, without more, to affirm the judgment. If I should ultimately agree with Lord Moncreiff, and change the opinion which I do at present entertain, I shall then have occasion to trouble your Lordships, in which case I shall enter more at large into the grounds of that difference

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with the Court below. For the present I shall move that the further consideration of this judgment be postponed.

LORD CHANCELLOR.—My Lords, I stated when this case was last before the House, that I wished to have an opportunity to look further into it; that in all probability, for the reasons I then explained to your Lordships, I should feel it my duty, in the result, to move an affirmance of the judgment pronounced in the Court below. That if I should on further consideration come to a different conclusion, and should move your Lordships to reverse the judgment, I should at the same time that I did so state the reasons on which I proceeded; but that if my opinion remained unaltered after the statement I then made, a further detail of reasons would be unnecessary. It is necessary only, my Lords, that I should now state, that further reflection and consideration have confirmed me in the view I then took of the case, and that I feel no hesitation in moving your Lordships, that the judgment of the Court below be affirmed. Under the circumstances of the case, I say nothing about costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

MONCRIEFF and WEBSTER—ALEXANDER DUFF,  
 Solicitors.

[5th August 1834.]

The Reverend JAMES CRAIG, Appellant.

No. 25.

ALEXANDER Duke of HAMILTON, Respondent.

*Reparation—Relief—Personal Obligation.*—A minister who was wrongously interdicted by the heritors from selling trees off his glebe, and who had been subjected in damages and expenses to the buyer,—Held (affirming the judgment of the Court of Session) barred by a transaction from claiming relief against the heritors.

IN the year 1814 the appellant, the Rev. Mr. Craig, who was then minister of the parish of Dalserf, sold to William Hamilton, some ornamental trees upon the glebe lands surrounding his manse, some of which were cut down immediately thereafter. The respondent, the Duke of Hamilton, and other heritors of the parish, applied to the sheriff of Lanarkshire for an interdict, which was granted in the first instance, but ultimately recalled, and the respondent and the other heritors who made the application were found liable in expenses, in which judgment they acquiesced, and the expenses were paid.

1ST DIVISION.

Ld. Corehouse.

Hamilton, the purchaser of the wood, had in the meantime transferred his bargain to James Stark, who in consequence of the interdict abandoned it, and raised an action of damages before the sheriff of Lanarkshire in September 1816 against the appellant. Pending this process the appellant made a claim against the respon-



No. 25.      dent, which he transmitted to Mr. Robert Brown, the  
 5th August    respondent's factor, at Hamilton, in these terms:—  
 1834.

|                                     |  | £  | s. | d. | £   | s. | d. |
|-------------------------------------|--|----|----|----|-----|----|----|
| CRAIG<br>v.<br>DUKE OF<br>HAMILTON. | Mr. Stark's purchase of wood, end of May 1814,   |    |    |    |     |    |    |
|                                     | ready money                   -   -   -   -  |    |    |    | 60  | 0  | 0  |
|                                     | Two and a half years interest, at 60s. per annum   | 7  | 10 | 0  |     |    |    |
|                                     | Paid by the first sale, Martinmas 1816   -   -   |    |    |    | 23  | 16 | 0  |
|                                     |  |    |    |    | 36  | 4  | 0  |
|                                     | Half year upon the balance, at 36s. 2d. per annum  | 0  | 18 | 1  |     |    |    |
|                                     | Paid by the second sale, June 1817   -   -   |    |    |    | 15  | 0  | 0  |
|                                     |  | £8 | 8  | 1  | 21  | 4  | 0  |
|                                     |  |    |    |    | 8   | 8  | 1  |
|                                     | Remainder due Mr. Craig of principal and interest  |    |    |    | 29  | 12 | 1  |
|                                     | Had to pay to the other purchaser, of damages, and to prevent<br>his bringing an action at law                   -   -   - |    |    |    | 5   | 0  | 0  |
|                                     |  |    |    |    | £34 | 12 | 1  |

Hamilton Palace, 22d July 1817.—I hereby authorize Mr. Brown to receive and discharge the above balance of 34*l.* 12*s.* 1*d.*, from the different heritors of Dalsersf, concerned in opposing my sale of timber to Stark, against whom I have no further claim on that account.

(Signed)      JAMES CRAIG.

The appellant afterwards moved, in the action at Stark's instance, that the respondent should be called as a party, for his interest. The respondent accordingly appeared, and the appellant raised a supplementary action of relief against him before the sheriff, in which he set forth,—“ That a proof and other proceedings have  
 “ recently taken place, with a view to ascertain the  
 “ amount of the said damages, and the same are now  
 “ about to be awarded in the said action: That this  
 “ award will necessarily be pronounced against the  
 “ complainer Mr. Craig, along with the said Duke of  
 “ Hamilton as an interdicting heritor; but the com-  
 “ plainer is entitled to be completely relieved of the  
 “ whole damages, expenses, and other consequents arising

“ from the said interdict; and as he may not be able  
 “ competently to obtain such relief in an action which  
 “ contains no regular conclusion against the said inter-  
 “ dicting heritors, and to which they have only been  
 “ incidentally called for their interest, it becomes neces-  
 “ sary to institute the present supplementary summons,  
 “ to be conjoined if necessary with the foresaid action :”  
 He therefore, concluded that the respondent, as the  
 leading heritor, by whose interdict the breach of bargain  
 was occasioned, should be decerned to make payment  
 “ of the sum of 200*l.* sterling, or such other sum, less  
 “ or more, as may be found to be the amount of the  
 “ damages sustained or to be sustained through the  
 “ foresaid action at the instance of the said James Stark,  
 “ or otherwise arising from the said interdict, deducting  
 “ always the sum of 34*l.* 12*s.* 1*d.* sterling, being the  
 “ difference between the price of the said timber when  
 “ first sold and the price actually obtained for it after  
 “ the interdict was removed, and which sum is agreed  
 “ to be paid to the complainer by the said Duke of  
 “ Hamilton; at least he should be decerned to free  
 “ and relieve the complainer of the whole damages  
 “ and expenses claimed against him by the said James  
 “ Stark, as also to pay to the complainer the whole  
 “ expenses and other loss incurred by him in defending  
 “ the said action, or in any other manner of way in con-  
 “ sequence of the foresaid interdict.”

In defence, the respondent rested mainly on the dis-  
 charge to be implied from the payment of the above  
 sum, and the declaration at the end of the docu-  
 ment. The sheriff substitute, on advising the process,  
 and also that at the instance of Stark, pronounced  
 a judgment in these terms:—“ In respect that the

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“ reverend pursuer has judicially admitted in his  
 “ defence, No. 2. of that process, that he sold the  
 “ timber in question to the other defender therein,  
 “ William Hamilton, who again sold the same to the  
 “ pursuer in that action, and that the reverend pursuer  
 “ cannot retract the admission so made; and in respect  
 “ that the contract for the sale of the timber was made  
 “ between this pursuer and Hamilton, not between that  
 “ pursuer and Stark, Hamilton only could claim  
 “ damages against the said pursuer for any loss sus-  
 “ tained in consequence of the non-fulfilment of the  
 “ contract; and in respect that it appears from the  
 “ letter No. 4. and receipt No. 12. of Stark’s process,  
 “ and is indeed distinctly admitted in that process by  
 “ the present pursuer, that Hamilton relinquished the  
 “ bargain and all his claim against the said pursuer in  
 “ consideration of 5*l.*, and that the noble defender paid  
 “ the pursuer that sum, and also the sum of 29*l.* 12*s.* 1*d.*,  
 “ being the difference between the original price of the  
 “ timber, and interest thereon, and the sum for which  
 “ it afterwards sold; and in respect that though it  
 “ appears, from the foresaid letter, that the reverend  
 “ pursuer undertook to relieve Hamilton from any  
 “ claim on the part of Stark, yet, as that undertaking  
 “ was a mere voluntary act of the pursuer, without any  
 “ legal claim on the part of Stark against him, and that  
 “ it has not even been alleged to have been entered  
 “ into with the knowledge, consent, or approbation of  
 “ the noble defender, that undertaking and the judicial  
 “ admission also made by the pursuer in the process  
 “ referred to, of his liability in damages to Stark,  
 “ cannot operate to the prejudice of the noble defender:  
 “ Finds that all claim which this pursuer had against

“ the said defender was fully and completely satisfied  
 “ and extinguished by payment of the sums contained  
 “ in the before-mentioned receipt, and that by virtue  
 “ thereof the defender is legally discharged of such  
 “ claim. Therefore dismisses the action; assoilzies the  
 “ noble defender from the conclusions thereof; and  
 “ finds him entitled to expenses.” Thereafter the  
 appellant was assoilzied from Stark’s action, and the  
 sheriff refused a petition in the case at his instance, “ for  
 “ the reasons already assigned, and in respect that the  
 “ action Stark v. Craig has been dismissed, and expenses  
 “ therein found due, both to the pursuer and noble de-  
 “ fender.” A reference was then made by Stark to the  
 appellant’s oath, the result of which was that the sheriff  
 decerned against the latter for 43*l.* of damages, and  
 100*l.* of expenses. He advocated the action against the  
 respondent to the Court of Session; but the Lord Ord-  
 inary in the first instance, and thereafter the Inner House  
 (26th May 1831), repelled the reasons, and found ex-  
 penses due.<sup>1</sup>

An appeal was entered, in which the main point con-  
 tended for by the appellant was that the payment of the  
 34*l.*, and the relative document, could not be construed  
 to import a discharge of the claim of relief from the  
 damages and expenses awarded against him in the pro-  
 cess at Stark’s instance.

LORD CHANCELLOR.—My Lords, this is a case in  
 which I have not the slightest shadow of doubt upon the  
 subject; and I move your Lordships to affirm this  
 judgment, with full costs, to be taxed in the usual way.

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\* 9 S. &amp; D., 632.

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There must be an end to such appeals as these, otherwise the appellate jurisdiction of this House will be a curse instead of any thing else. There is nothing like a point of law here, and the expense of this appeal cannot be less than 100*l*.

*Mr. Serjeant Spankie.*—I am happy to say the party is very rich.

LORD CHANCELLOR—That is a good thing; it is only right your Lordships should make him pay; but the blame is not always imputable to the party himself, but the adviser; and I only wish your Lordships could get at him, and make him suffer.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the sum of one hundred and nineteen pounds ten shillings, for his costs in respect of the said appeal.

THOMAS DEANS — RICHARDSON and CONNELL,  
 Solicitors.

[7th August 1834.]

HENRY ALEXANDER DOUGLAS, surviving Assignee      No. 26.  
under a Commission of Bankruptcy of John Stein,  
Appellant.

GEORGE BRUNTON and GEORGE WARDLAW,  
Respondents.

*Cautioner.* — A party in July applied to the sheriff for a warrant to compel delivery of goods alleged to have been deposited for his behoof with a warehousekeeper in January, in security of bills which he had then granted in favour of the owner. At this time the owner was insolvent; and having granted a conveyance of his estate to trustees for behoof of creditors, they agreed to deliver the goods on the party finding caution to account for the proceeds (reserving all claims competent to the creditors); and caution having been found, the goods were delivered:— Held (affirming the judgment of the Court of Session) that, in a question with the cautioners, it was not competent to allege that the goods so delivered were not the same as those consigned, or intended to be consigned, in January, and that thereby an illegal preference had been obtained, but that the cautioners were bound to account only on the footing that the goods were the same as those consigned in January.

**JAMES WILLIAMSON**, spirit dealer in Edinburgh, presented, on the 27th July 1812, a petition to the sheriff, stating “ that in the month of January last “ Mr. John Stein, distiller at Canonmills, proposed to “ consign to him fifty puncheons of malt aqua vitæ, upon

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Lord Fullerton.

No. 26. “ the petitioner permitting Mr. Stein to draw on him  
 7th August “ to the amount of 3,414*l.* 15*s.* 6*d.* sterling, which was  
 1834. “ agreed to; that a consignment was accordingly made,  
 DOUGLAS, “ and as the petitioner at the time had not room in his  
 Stein’s Assignee, “ own cellars to receive the spirits, the same were de-  
 v. “ posed, for his behoof and on his account, in a cellar  
 BRUNTON “ belonging to Mr. James Bartram at Canonmills; and  
 and “ it was also conditioned, that so soon as Mr. Stein  
 WARDLAW. “ retired the two bills which the petitioner granted, or  
 “ any others that might be substituted in their place,  
 “ the spirits were to be delivered over to him, but in  
 “ case the petitioner was obliged to retire either or both  
 “ of the bills, he was to have it in his power to sell the  
 “ spirits.” He then stated that he had granted two  
 bills, which were retired, and others substituted in their  
 place, which were current; that he had now room for  
 the spirits, which were contained in fifty puncheons,  
 marked in an invoice of consignment, and as Bartram  
 declined to deliver them, he prayed the sheriff to “ ordain  
 “ the said James Bartram to give the petitioner access  
 “ to the said cellar, and to remove the said fifty pun-  
 “ cheons of malt aqua vitæ to his own cellars.”

At this time Stein was insolvent, and sequestration of  
 his estates was about to be applied for. Bartram lodged  
 answers, merely stating, that as Stein was the party chiefly  
 interested he ought to be called. He was accordingly  
 called, and gave in a minute, stating “ that the trans-  
 “ action between Mr. Williamson and him is correctly  
 “ set forth in the petition; but in his particular situ-  
 “ ation, and as he expects that a sequestration of his  
 “ estate will be immediately applied for, and awarded,  
 “ he does not think it proper to interfere further in this  
 “ business, leaving it to the person who may be ap-

“ pointed interim factor to urge any plea he might be  
 “ advised to, and to your Lordships to pronounce such  
 “ orders as to you may seem just.”

In place of a sequestration Stein executed a conveyance of his estates to trustees, for behoof of his creditors, whereupon an arrangement was entered into between the trustees and Williamson, as expressed in the following letter, dated 7th August 1812, addressed by Williamson to the trustees:—“ Whereas on the application made by me to  
 “ the sheriff of Edinburgh for a warrant on Mr. James  
 “ Bartram, to deliver to me fifty puncheons of whiskey,  
 “ consigned to me by Mr. John Stein, Canonmills, and  
 “ now lying in Mr. Bartram’s cellars, sundry proceedings  
 “ took place; and it has been agreed upon by you, as  
 “ trustees of the distillery companies in which John  
 “ Stein is concerned, to consent to my receiving these  
 “ spirits, on my giving the obligation underwritten,  
 “ guaranteed by Mr. George Brunton and Mr. Thomas  
 “ Wardlaw, as also under written. Therefore I oblige  
 “ myself, and my heirs, to account for the proceeds of  
 “ the said fifty puncheons of whiskey to you, as trustees  
 “ foresaid, when required so to do; and I declare that  
 “ your consenting to my now receiving the same shall  
 “ not put me in a better situation than if you had with-  
 “ held your consent, but that all my claims on the said  
 “ whiskey, under the foresaid obligation or otherwise,  
 “ and all the defences of the said John Stein or his  
 “ creditors thereagainst, shall be and are hereby re-  
 “ served entire.” Brunton and Wardlaw, of the same  
 date, each wrote a document in these terms:—“ I oblige  
 “ myself, as surety for the said James Williamson, that  
 “ he shall fulfil his obligation in the before-written  
 “ letter, and that I shall sign a regular obligation on

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No. 26. “ stamped paper, when required so to do.” Williamson then got delivery of the whiskey, and sold it.

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Thereafter a commission of bankruptcy was issued against Stein, as a banker in London, and the appellant, as surviving assignee under it, raised an action, in name of the trustees, against Williamson, on the footing that, as the spirits had not been delivered out of Stein's stock at the date of the petition, and that those which were delivered under the arrangement with the trustees did not correspond with the spirits specified in the invoice, such delivery constituted an illegal preference, and therefore concluding for payment of the whole proceeds, after deducting the expenses of sale. Pending this action Williamson became bankrupt, and his estates having been sequestrated, he was discharged, after payment of a dividend of about sixpence in the pound. The appellant then instituted an action against the respondents, Brunton and Wardlaw, the sureties, concluding, on the same footing, that they should be ordained “ to make payment of the free proceeds thereof, as also of the sum of “ 75*l.* sterling, as the value of the fifty casks containing “ the said spirits.”

In defence, the respondents maintained, that as, at the date of the transaction between the trustees and Williamson, the trustees were in the undisputed management of the affairs of Stein, as a distiller, and held out to the respondents that the fifty puncheons, delivered to Williamson in July, were the same as those referred to by him in his petition, and which he stated to be those which had been put in Bartram's cellar in January; and as the respondents interposed as sureties on that footing, it was not now competent, in a question with them, to maintain any plea founded on the assumption that the spirits deli-

vered in July were not the same as those put into Bartram's cellar in January; and as the alleged illegal preference rested entirely on that assertion, no claim could be made against them to account for the spirits otherwise than subject to deduction from the proceeds of the amount of the bills paid by Williamson.

The Lord Ordinary pronounced this interlocutor:—

“ Finds, that the action, though raised and insisted in  
 “ in the name of the assignees of John Stein, is laid on the  
 “ obligation of the 7th of August 1812, granted by the  
 “ defender Williamson, and Messrs. Brunton and Ward-  
 “ law, as his cautioners, to the voluntary trustees of  
 “ John Stein: finds, that that obligation bore express  
 “ reference to certain proceedings which had taken  
 “ place in an application made by the defender William-  
 “ son to the sheriff of Edinburgh for a warrant on  
 “ Mr. James Bartram to deliver fifty puncheons of  
 “ whiskey said to have been consigned to him, William-  
 “ son, by John Stein, Canonmills, in security of certain  
 “ acceptances granted by him to John Stein: finds, that  
 “ in these proceedings the averment of the defender  
 “ Williamson was, that the fifty puncheons of whiskey  
 “ had been consigned to him by John Stein in the  
 “ month of January 1812, and had been at that time  
 “ placed in the cellar of Bartram for his, Williamson's,  
 “ behoof: finds, that in support of this, reference was  
 “ made to the invoice there produced, bearing date the  
 “ 11th of January 1812, identifying the puncheons by  
 “ the particular numbers of the casks: finds, that in  
 “ these proceedings appearance was made by Bartram,  
 “ who, without denying these allegations, expressed his  
 “ readiness to obey any order pronounced by the sheriff  
 “ regarding ‘ the spirits in question:’ finds, that in

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No. 26. “ these proceedings appearance was also made by John  
 “ Stein, who stated in a minute ‘ that the transaction  
 7th August “ ‘ betwixt Mr. Williamson and him was correctly set  
 1834. “ ‘ forth in the petition ;’ but waived interference on  
 DOUGLAS, “ the ground that a sequestration of his estate was likely  
 Stein’s Assignee, “ soon to be applied for : finds, that in these circum-  
 v. “ stances the obligation libelled was granted by the  
 BRUNTON “ defender Williamson and his cautioners, bearing refe-  
 and “ rence to the proceedings before the sheriff, and binding  
 WARDLAW. “ them to account for the ‘ proceeds of the said fifty  
 “ ‘ puncheons of whiskey :’ finds, that on that obligation  
 “ being granted, the whiskey was delivered to William-  
 “ son, and has since been sold : finds, that the action  
 “ concludes against the defenders for the whole free  
 “ proceeds of the sales of the whiskey, on the allegation  
 “ of fact that the whiskey had not been consigned to  
 “ Williamson and placed in Bartram’s cellars in January  
 “ 1812, but had been transferred from Stein’s stock so  
 “ late as the 27th of July, and the ground in law that  
 “ the delivery as of this last date was illegal and invalid  
 “ in consequence of the bankruptcy of John Stein :  
 “ finds, that the obligation by the cautioners, bearing  
 “ reference to the proceedings before the sheriff, and  
 “ granted to the voluntary trustees of John Stein, was  
 “ qualified by the admission made by John Stein and  
 “ all the parties in those proceedings, that the fifty  
 “ puncheons of whiskey had been delivered in January  
 “ 1812 : finds, that the grounds of action above stated,  
 “ however available against Williamson or any of the  
 “ other parties who may be proved to have been cogni-  
 “ zant of such misrepresentation or fraud, is not covered  
 “ by the obligation contracted by the cautioners, against  
 “ whom no such charge is made, and therefore assolizies

“ the cautioners, Messrs. Brunton and Wardlaw, from  
 “ the conclusions of the action for the whole free pro-  
 “ ceeds of the whiskey, and decerns; but in respect  
 “ they admit their liability for the balance of the price  
 “ of said whiskey, in so far as not exhausted by the  
 “ retirement of Williamson’s acceptances, appoints the  
 “ case to be enrolled, that such balance, if any, may be  
 “ ascertained: and farther, in respect that the pursuers  
 “ aver that the defender Williamson procured the  
 “ transference of the whiskey on the 27th of July 1812,  
 “ and consequently was aware of the misrepresentation  
 “ in that particular made in the proceedings before the  
 “ sheriff, appoints parties to be farther heard on the  
 “ disposal of that part of the case.”

The appellant reclaimed, but the Court (12th Feb. 1833) adhered.\*

Douglas appealed.

*Appellant.*—As Williamson obtained delivery after the insolvency of Stein, and when (as was offered to be proved) he was in the knowledge of the insolvency, such delivery was illegal; and neither he nor his cautioners were entitled to avail themselves of the spirits to the effect of applying the proceeds which belonged to the general creditors, in liquidation of a debt due to Williamson.† Nor could the arrangement made with the trustees, who were ignorant of the facts, and had no power to compromise the rights of the assignees, afford any protection against an illegal appropriation of part of the bankrupt’s estate, even though such arrangement had

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† Stats. 1621, c. 18., 1696, c. 5.

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been sanctioned by the sheriff, which it was not. Besides, all the rights of the creditors were reserved entire by the terms of the letter, and consequently such reservation qualified the cautionary obligation to the effect of rendering the respondents liable in case it should be found that Williamson had no legal right to delivery.

*Respondents.*—The demand made by the appellant is, that the respondents shall account on the footing that Williamson got possession of the goods unlawfully, and on terms inconsistent with the statement in the petition. But Stein judicially declared that that statement was quite correct; it was adopted by the trustees as such, and the respondents undertook their obligation on the faith of the statement so made by Stein, and held out to them as correct by the trustees. The letter of Williamson expressly referred to the petition, and therefore the cautionary obligation must be held to be qualified by the declaration that the spirits delivered in July were the same as those deposited for his behoof with Bartram in January. The respondents have always been willing to account on that footing, but they cannot be called on to account on a footing directly the reverse.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of one hundred and sixty-five pounds six shillings and five-pence, for their costs in respect of the said appeal.

HYNDMAN and GODDARD, RICHARDSON and CONNELL,  
Solicitors.

[15th August 1834.]

JAMES COX, Trustee upon the sequestrated Estate of  
Stead and Paterson, and JOHN PATERSON, the sur-  
viving Partner, Appellants. No. 27.

MAGDALENE and MARY STEAD, Respondents.

*Partnership—Lease.*—One of the two partners of a company let to the company a mill, with the large machinery fixed therein, and assigned the small machinery to the company, the value being to be placed at his credit in their books; he thereafter died in debt to the company; the mill with its appurtenances was sold; and the full rent stipulated in the lease for the buildings and machinery was paid by the surviving partner, who by the lease was allowed to continue lessee, and take the small machinery; and this partner became bankrupt:—Held (affirming the judgment of the Court of Session) that the trustee on his sequestrated estate was not entitled to appropriate the large machinery as company estate, and to obtain repetition of the rent paid since the death of the other partner, in so far as might effeir to this machinery.

THE late David Stead, card manufacturer in Leith Walk, Edinburgh, executed, on the 27th December 1792, a trust disposition and deed of settlement, by which he disposed to trustees his heritable and moveable property, with powers of sale; and directed that after payment of his debts the residue should be divided amongst his surviving children.

The trustees, in 1807, sold the heritable property, consisting chiefly of a card manufactory, to John, the

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eldest son, subject to the real burden of provisions amounting to about 5,200*l.* to the respondents, his two sisters, and to his brother Patrick of about 800*l.*; for which sums he also granted personal bonds, and he was duly infeft.

John made considerable alterations on the buildings, having pulled down the former card manufactory, and erected a new one, containing a steam-engine and large gearing or mill machinery, for the purposes of the business, which were built into and incorporated with the building, so as to be incapable of separation without being destroyed.

On the 19th of April 1817 he entered into a contract of partnership with John Paterson, as card manufacturers, under the firm of Stead and Paterson, from the 1st of that month till 30th June 1838, subject to breaks at particular periods. At the same time a lease was granted by Stead to the company of the premises for a period corresponding with the contract of partnership. By that lease he conveyed to the company "all and whole the mill, house, annealing-house, timber-shed, card factory, buildings, mill, machinery, or large gearing, and steam-engine erected thereon, being the whole mill, buildings or manufactory, as lately occupied by the said John Stead, and David Stead and Son, as a card manufactory, built on part of the three acres of the lands of Pilrig, originally feued out by Mr. James Balfour, advocate, to David Cairns and his spouse, and which now belong to the said John Stead." The rent payable under the lease was to be 360*l.* per annum; and, by a subsequent clause, it was provided, "that in the event of the death of one of the partners of that company,

“ the remaining partner might take the benefit of that  
 “ lease, during the whole space of twenty-one years, or  
 “ such part thereof as may be then to run, on payment  
 “ of the rent, and implement of the other prestations  
 “ therein contained, and shall in every respect come  
 “ into the place of the said company of Stead and  
 “ Paterson.”

By the contract of partnership it was stipulated,  
 “ that the said business shall be carried on in the  
 “ range of buildings, and on the ground situated at the  
 “ foot of Leith Walk, belonging to the said John Stead,  
 “ and nowhere else, of which buildings and ground he  
 “ has granted a lease to the said copartnery, of even  
 “ date herewith, during the subsistence of this con-  
 “ tract. That the whole stock of cards and wire, and  
 “ the implements and machinery of the card factory,  
 “ presently belonging to the said John Stead, shall be  
 “ taken over by the said copartnery in manner following,  
 “ viz. the stock of cards and wire on hand ” on certain  
 specified terms, “ and the implements of the card  
 “ factory at the valuation to be put thereon by trades-  
 “ men mutually agreed on by the parties, and likewise  
 “ to be inserted in the said journal-book of the com-  
 “ pany ; and the machinery of the mill, at the valuation  
 “ to be put thereon by Mr. James Scott, millwright in  
 “ Cupar-Fife, as soon after the date of these presents  
 “ as convenient. That the value of the said stock, so  
 “ to be taken over by the company from the said John  
 “ Stead, shall not be paid over to him at the time, but  
 “ shall be placed to his credit with the copartnery, and  
 “ remain there during the subsistence of this contract,  
 “ and he shall be declared a creditor to the company  
 “ therefor, as well as for the legal interest thereof,

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“ which shall be placed to his credit annually. That  
 “ the parties shall make up just and exact inventories  
 “ of the whole stock given over as above mentioned,  
 “ and the same shall be signed by both parties, and a  
 “ copy thereof delivered to each party, or the same  
 “ shall be entered in the books of the company ; which  
 “ stock and materials, for the manufacturing thereof,  
 “ contained in such inventories, together with what  
 “ farther cards and wire shall be manufactured by the  
 “ company from said materials, or other materials to  
 “ be afterwards purchased by the company, are to be  
 “ sold and disposed of for the benefit and advantage of  
 “ the partners, and the profit arising therefrom shall  
 “ be divided equally between them,” &c. “ That upon  
 “ the dissolution of the said copartnership, &c., the  
 “ said John Stead hereby obliges himself, in that event,  
 “ to take over from the said company, the whole stock  
 “ of cards, wire, and materials that may then be on  
 “ hand, as well as those that may be in process of  
 “ manufacture, and the implements of the card manu-  
 “ factory, on the same terms as the company have  
 “ agreed to take the same from the said John Stead, as  
 “ at said 1st of April 1817, as particularly above men-  
 “ tioned, and likewise the machinery of the said mill,  
 “ at the valuation to be put thereon by two millwrights  
 “ to be mutually named, one by each partner; and  
 “ upon his so taking over the goods, materials, and  
 “ machinery, he shall be bound to pay, or give good  
 “ security for the payment, to the said John Paterson,  
 “ of the free balance falling due to him, and that within  
 “ twelve months from the date of the said dissolution.”  
 And it was declared, “ that in the event of the said John  
 “ Stead being the surviving partner, he shall be bound,



“ and he hereby obliges himself, to take the whole stock  
 “ of goods, materials, and machinery, which shall be  
 “ upon hand, belonging to the company at the time, on  
 “ the same terms as he the said John Stead obliges  
 “ himself as aforesaid to take the same, in the event of  
 “ the dissolution of the company by mutual consent.  
 “ And in the event of the said John Paterson being the  
 “ surviving partner, he shall have it in his power to take  
 “ and keep the whole stock of goods, materials, and  
 “ machinery, on the same terms; declaring always, that  
 “ if the said John Paterson, in the event above specified,  
 “ shall continue lessee of the card factory,” then a certain  
 optional power should be withdrawn, and he should  
 be bound to take the stock of goods, materials, and  
 machinery on specified terms: “ And in case the said  
 “ John Paterson shall happen to be the surviving  
 “ partner, and shall not incline to continue to carry on  
 “ the business, and to take the goods of the company at  
 “ the rate foresaid, then the representatives of the said  
 “ John Stead shall be bound to take over the said goods,  
 “ materials, and machinery, on the same terms as the  
 “ said John Stead is bound to do on the dissolution of  
 “ the company by mutual consent, or by the death of  
 “ the said John Paterson; and on the representatives  
 “ of the said John Stead so taking the goods, materials,  
 “ and machinery, they shall be bound to pay or give  
 “ good security to the said John Paterson for his pro-  
 “ portion of the proceeds thereof, in the same manner  
 “ as the surviving partner is bound to do in the event  
 “ of his taking the goods, materials, and machinery as  
 “ aforesaid.”

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The business was carried on by the company till the

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23d of November 1819, when John Stead died in insolvent circumstances.

Thereafter the respondents and their brother Patrick, as heritable creditors, having executed poindings of the ground, and other creditors threatening similar proceedings, the subjects were judicially sequestrated in November 1820, and a factor appointed to collect the rents, and accordingly Paterson paid to him the full rent of 360*l*.

The respondents afterwards obtained a decree of adjudication against the heir of John Stead, and in July 1821 they brought a process of ranking and sale, in which Paterson was examined as a witness in the preparatory proof of the value, and he deponed, "that, " as surviving partner of the said concern of Stead " and Paterson, he holds a lease of the said manu- " factory, buildings, machinery, steam-engine, and " whole other buildings therein described, commencing " the 1st day of April 1817 years, and terminating " the 30th day of June 1838;" and, "that for the " whole subjects contained in the said lease in favour " of Stead and Paterson the deponent pays the yearly " rent of 360*l*." The value was fixed according to this rental, by two valuers, at 8,785*l*.

A warrant of sale was granted, and an advertisement published, which described the subjects as, "All " and whole that part of the lands of Pilrig called " Stead's Place, with the extensive card factory erected " thereon, and appurtenances;" and in the articles of roup, prepared by the clerk to the process, the description was in these terms: "All and whole these three " acres of ground of the lands of Pilrig, thereof formerly

“ feued out, &c., together with the dwelling-house, offices,  
 “ and buildings erected on part of the said lands, and  
 “ particularly the card manufactory, appurtenances, and  
 “ whole pertinents of the same, as presently possessed  
 “ and held in lease by John Paterson, card manufac-  
 “ turer in Leith, as surviving partner of Stead and  
 “ Paterson, conform to the lease entered into between  
 “ the said deceased John Stead and the said Stead and  
 “ Paterson dated the 19th day of April 1817.”

The lands were purchased at the sale by the respon-  
 dent, Mary Stead, for herself and her sister, and a decree  
 of sale was afterwards pronounced. A state of the fund  
 for division, (which consisted of the price and interest,  
 and rents uplifted by the judicial factor,) was next made  
 up, and a scheme of division prepared by the common  
 agent. On payment of the price to the preferred cre-  
 ditors, agreeable to that scheme, the respondent Mary  
 Stead received from each of them discharges and con-  
 veyances of their grounds of debt and diligences. She  
 had thus two titles to the subjects: one as purchaser  
 under the decree of sale, the other as an heritable cre-  
 ditor in her own right, and assignee to the rights of the  
 other heritable creditors, whose debts exceeded, by more  
 than 1,200*l.*, the whole price.

The date of her entry was declared to be at Whit-  
 sunday 1823, and she accordingly then entered to the  
 possession of the subjects, by drawing, half yearly, from  
 Paterson, for seven years, the full rent of 360*l.* No  
 claim had been made by Paterson that the steam-engine  
 and mill machinery ought not to be sold as Stead's pro-  
 perty, or that he held any other right to them than as  
 tenant under the lease.

On the 18th of May 1831 the estates of the com-

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pany, and of Paterson as an individual, were seques-  
 trated, under the bankrupt act, and the appellant  
 Mr. Cox was chosen trustee. He then instituted before  
 the Court of Session a summons of declarator, count,  
 reckoning, and payment, against the respondents and  
 others, concluding to have it found and declared,  
 “ Primo, that the machinery, or large gearing, stock  
 “ in trade, and utensils, belonging to the said deceased  
 “ John Stead, were valued and placed to the credit  
 “ of his account with the company of Stead and  
 “ Paterson, in terms of their contract of copartnery ;  
 “ that the whole value thereof was thereafter over-  
 “ exhausted, by payments made to and drawings by  
 “ the said John Stead, stated to his debit in his said  
 “ account, leaving a balance due by him to the extent  
 “ of 1,150*l.* 8*s.* 6*d.* ; and that therefore the said machi-  
 “ nery, or large gearing and utensils, thus became the  
 “ absolute property of the said company at the period  
 “ of the said John Stead’s death, and were no longer  
 “ comprehended under the foresaid lease granted by  
 “ the said John Stead to the company, and no rent was  
 “ legally exigible therefor : Secundo, that the said  
 “ company of Stead and Paterson, or John Paterson,  
 “ the surviving partner thereof, was entitled, at the  
 “ period of the dissolution of the copartnery, to place  
 “ the value of the steam-engine mentioned in the lease,  
 “ and then in their possession, to account of the afore-  
 “ said balance of 1,150*l.* 8*s.* 6*d.*, due to the company  
 “ by the said John Stead ; and that therefore no rent  
 “ was afterwards exigible for the said steam-engine,  
 “ from the company of Stead and Paterson, or John  
 “ Paterson, the surviving partner thereof, by the said  
 “ John Stead’s representatives, creditors, or assignees :

“ Tertio, that although the defenders exacted from the  
 “ said John Paterson, or Stead and Paterson, the full  
 “ amount of the gross rental of 360*l.*, provided for in  
 “ the lease, as payable for the use and possession of the  
 “ buildings, steam-engine, and machinery, the said  
 “ John Paterson, or Stead and Paterson, were legally  
 “ entitled to deduction or retention from the said rent,  
 “ of a sum corresponding to the value of the steam-  
 “ engine and machinery, on comparison with the value  
 “ of the buildings which, at John Stead’s death, became  
 “ the property of his heirs or heritable creditors; and  
 “ that the defenders having exacted, drawn, and taken  
 “ payment of the full rental, such was illegal and un-  
 “ authorized in the circumstances of the case. And it  
 “ being so found and declared, our said Lords ought to  
 “ remit to qualified persons, in order to ascertain the  
 “ respective values and rentals effeiring to each of the  
 “ different subjects contained in the said lease, and to  
 “ report thereon; and to ascertain what proportion of  
 “ the foresaid gross rental of 360*l.* sterling, contained  
 “ in the lease, is attachable to the steam-engine and  
 “ machinery, or large gearing, and what proportion is  
 “ attachable to the buildings; and the respective rents  
 “ being so ascertained,” then the respondents should  
 count and reckon for the rents overdrawn by them, with  
 interest; and that it should also be declared, “ that the  
 “ said steam-engine and machinery, or large gearing,  
 “ are the property of the sequestrated estate of Stead  
 “ and Paterson, and John Paterson, and belong to the  
 “ pursuer, as trustee foresaid; and that the said de-  
 “ fenders have no right to interfere with or interrupt the  
 “ pursuer in the management and disposal thereof.”

In defence the respondents pleaded, 1, that neither

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Paterson nor the company had any right to the steam-engine and great gearing, as they had never been conveyed to them by John Stead; 2, that the respondents, as purchasers at the judicial sale of the subjects, with their appurtenances and pertinents, had right to the steam-engine and great gearing, not merely as being fundo annexa, but as included in the property sold; and, 3, that neither had Paterson any claim of retention; and besides, the distinct acknowledgments of Paterson, that the steam-engine and great gearing belonged to the respondents, and that he was liable to them for the full rent stipulated in his lease, barred the claim made by the appellant.

Lord Mackenzie assolizied the respondents simpliciter, with expenses, and the Court, on the 1st June 1834, adhered.\*

Cox and Paterson appealed.

*Appellant.*—By the contract of copartnership it was stipulated that the whole “implements and machinery” should be taken over by the copartnership, as they stood upon the 1st of April 1817; and it is therefore clear that, subsequent to this date, the copartnership, and not John Stead, was the proprietor of the implements and machinery. That contract also provided that John Stead should be the creditor of the copartnership for the value of what was to be taken over, and that he was to receive interest upon the price. It necessarily followed from this provision that if John Stead should draw from the copartnership a larger sum than the value

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\* 11 S. & D. 672.

of what was so placed to his credit, he could have no claim to the ipsa corpora of the articles assigned over, and that the exclusive right to these articles would belong to the partner who had not overdrawn his share, and who was the creditor of John Stead to the extent of his overdrafts.

The respondents, no doubt, found on the terms of the lease, which was made out inaccurately, for it embraces part of the subject confessedly included in the contract, inasmuch as it specifies the entire manufactory, or in other words, all that was necessary for the manufactory; whereas the contract of copartnership provided that the implements of the card factory should be valued by tradesmen mutually chosen, and the mill machinery should be valued by Mr. James Scott, millwright in Cupar-Fife, and that these valuations should be inserted in the books of the copartnership. According to this stipulation, a most anxious enumeration of all the articles was made in the books of the company, in which the leading article is the large machinery, valued at 2,351*l.*, and which is placed in contradistinction to the cards, which were valued at 2,319*l.* 17*s.* 4*d.*, and the stock of utensils, which were valued at 932*l.* 7*s.* 3*d.*

For these sums, amounting to 5,603*l.*, Mr. Stead received credit in the books of the copartnership; and as he died indebted to the company in a balance of 1,150*l.*, after getting credit for the full price, the large machinery became the absolute property of the company, and they were farther entitled to retain the steam-engine in liquidation of that balance.

No doubt the respondents attempt to maintain that the large machinery was not intended to be conveyed,

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and they have referred in aid of this view to the conduct of Paterson in paying rent without any deduction on account of the machinery, and that when examined as a witness in the ranking and sale he did not pretend that it was conveyed to the company. But Paterson was not examined in relation to the question at issue here,—he was so merely as to the rent payable for the premises, and the statement made by him under these circumstances cannot be founded on in a question with his creditors. Equally irrelevant is the circumstance of paying the full rent. He was bound to do so by the lease, and could not therefore resist payment; but this leaves the point untouched, whether the machinery was embraced in the lease.

The respondents have also founded on the charter of sale, and maintain that the terms “appurtenances and pertinents,” include the steam-engine and great gearing, as *fundo annexa*. But this is begging the whole question; for the question is, whether or not these are part of the *fundus*? The appellant’s plea is, that a steam-engine and mill machinery, being moveable property, cannot be sold or acquired under a ranking and sale in a question with personal and real creditors. It is no doubt true that the general rule of law is that things *fundo annexa* become part of the freehold. This was the law of Rome, and it seems to be the law of modern Europe. All the doctrines in regard to fixtures are founded upon that law. Objects in their own nature moveable, change or lose their character by being incorporated with immoveable subjects. In questions of succession this is settled. But if these objects admit of severance from the freehold, and can be adapted to any other freehold, still more, if they can

be used per se, and if, moreover, these objects are valuable for the purposes of trade, then their temporary connexion with any proper freehold will not change their original character, and make that heritable which was originally moveable or personal property.

It would be contrary to every consideration of public policy, or equity betwixt particular individuals, to hold that a manufacturer who carries with him a large and valuable stock of implements into premises which he has occasion to occupy for a short time, and which can only be used by being fixed in the premises, makes them a part of the freehold by the temporary annexation, and thereby deprives himself of the right of removing them, and subjects them to such process as may be competent to the real creditors of the freehold. There are many manufactures in which a complete stock of machinery admits of being removed from place to place, and in point of fact, is daily so removed. In many cases, the machinery is really more valuable than the freehold; and it would not be worse policy to make the freehold follow the fortune of the machinery, than to make the machinery the inevitable accompaniment of the freehold. If it be wise that there should be two species of property, subject to different species of diligence and different courses of succession, the distinction must always be kept up betwixt the two species of property, and this distinction is conformable with all the usages and conveniences of trade. In the earlier stages of the Scottish practice, the inclination of the courts and of the country was, as much as possible, to give every species of property the character of heritable estate. The heir was always considered as the persona dignior in every question as to the character of property.

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Things which were purely moveable became heritable by destination for the use of the heir: hence the class of subjects which were denominated heirship moveables. In remote times the law had very little regard for merely personal estate; and in fact personal property was of very little account, and existed only to a very limited extent. These notions gradually relaxed with the extension of personal estate; and now it admits of no question that the subject does not become heritable merely by its destination or appropriation, unless, by having been so destined or appropriated, it cannot be separated from the freehold without being destroyed.\*

All the Scotch authorities refer to this as a question of general law, upon which the decisions of other countries are entitled to great consideration, and in particular reference is invariably made to the authorities in England, and that law is favourable to the plea of the appellant.† Neither on this nor on any other point of the case did the Lord Ordinary express any specific opinion, and the Court adhered *super totam materiam*. The decision, as it now stands, establishes the principle that a steam-engine is heritable in a question with creditors, although it might be removed, and might be as valuable in any other place as that in which it is attached. The same result ensues in regard to the large machinery. From a review of the proceedings in the ranking and sale it is seen that these articles were not

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\* Hunter's Law of Landlord and Tenant, pp. 240, 256; Heineccius, p. 1. sec. 194; Digest, lib. xix. tit. 117. sec. 7.; Sanford on Heritable Succession, vol. ii. p. 218; Bell's Com., vol. i. p. 753; Hyslop v. Hyslop, 18th Jan. 1811, Fac. Coll.; Arkwright v. Billinge, 3d Dec. 1819, Fac. Coll.; Niven v. Pitcairn's Trustees, 6th March 1823; 2 S. & D. 269, new ed. 239; Stair's Institute, by Mr. More, p. 144.

† Amos and Ferard's Law of Fixtures, Introduction, pp. 20, 43.

actually included in the title which the respondents have obtained; and even although these articles had been so included, the parties have now joined issue in a proper declaratory process for the purpose of determining whether they were truly of a proper moveable or heritable character; and for having it found, that if they were moveable they belonged to Paterson, either absolutely in property, or in lien for the security of the debt which was due to him.

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*Respondents.*—The basis on which the appellant's case rests is, 1st, that Stead was indebted to the copartnery of Stead and Paterson in a sum of 1,150*l.*; 2d, that the mill machinery formed part of the company funds, which Paterson was entitled to hold in satisfaction pro tanto of the debt; and that although the steam-engine never belonged to the company, he was entitled to retain it till full payment of the debt due by Stead to him, as the surviving representative of the company. But the allegation of the pretended debt is unfounded, and no evidence in support of it has been produced. Even if any such did appear, still it remains to be seen how that would give any right to the subject in question to the appellant. The lease specified in express terms, as part of the subject let, the “ mill machinery, or large gearing, and steam-engine;” and the rent payable for the whole was 360*l.* It could not be the meaning of the contract of copartnery that the very subjects which were let by Stead to the company should be at the same time sold and conveyed to it; and it is admitted by the appellant that the steam-engine never was conveyed to the company. But the mill machinery, or great gearing, is as clearly made part of the lease as the steam-engine, and both therefore re-

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mained the individual property of John Stead; so the appellant, even supposing him to be a personal creditor of John Stead, had no better right to these than Stead's other creditors. He could not, at his own hand, have retained them in payment of Stead's debt. The title under which the company held them was one of temporary possession under a contract, and he could no more have made it absolute than a banker could retain, in payment of a general balance, a sum which had been put into his hands under a special contract, and destined for a particular purpose. He could only proceed by constituting his debt against Stead, and then completing a preference over the subjects by the usual process of law. Had he attempted this, the attention of the other creditors of John Stead would have been called to the subject, and the pretended claim investigated, and the unfounded nature of it exposed. Accordingly all the acts of Paterson are inconsistent with the pretensions now made by the appellant.

On Mr. Stead's death, in 1819, Paterson called a meeting of the creditors of the company, and laid before them a state of affairs, offering a composition of about 10s. in the pound, which they accepted; and in the state none of the subjects in question were included. He paid, without objection, to the judicial factor the full rent down to the judicial sale in 1823. And, although fully aware of the dependence of the ranking and sale, in which he was examined as a witness, he not only made no claim to the subjects which he saw advertised for sale, but he stated on oath his only title of possession to be the lease to Stead and Paterson, and no alleged right of property in the subjects. Farther, for seven years after the subjects were sold, he

regularly paid the full rent to the respondents. These facts are clearly demonstrative of his understanding, and amount to an admission that he had no right to the subjects now claimed by the appellant. In the face of these facts, neither he nor the appellant can be permitted to say, that he did all along consider himself as proprietor, and intended, at some time or other, to found on and establish his preference. Such concealment of his intentions would, on principles of equity, be a complete bar to his claim.\*

But, independent of these pleas, the appellant cannot, so long as the decree and charter of sale is unreduced, make any claim to the subjects in question. He attempts to elude this objection by alleging that the steam-engine and great gearing must be regarded as moveable, and so not carried by the transfer of the building. But, in the first place, although the decree of sale, following the terms of the old titles, simply conveys the three acres of ground as possessed by Stead and Paterson, without even specially enumerating the manufactory at all, yet this general reference was enough, for Stead and Paterson possessed the whole subjects included in the lease, and consequently both the steam-engine and large gearing. But the terms of the decree are farther to be explained by those of the advertisement and articles of roup, and both of these distinctly specify the appurtenances and pertinents of the card manufactory, as well as the building itself. It is impossible to doubt that the price paid was materially affected by the consideration that these were included.

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\* Lea against Landale, 16th Jan. 1828, 6 Shaw and Dunlop, 350; Munro against Hogg, 14th December 1830, 9 Shaw and Dunlop, 171.

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In the second place, the steam-engine and large gearing, or mill machinery, were in their own nature heritable, and so fell under the operation of the prior heritable securities belonging to the respondents in their own right, or as assignees of the other heritable creditors, and of the decree of sale. No steam-engine once incorporated with a manufactory building can be regarded in any other light than as a fixture, since, whatever may be the value of the building, the connexion between the two cannot be separated without ruining the building, if not materially damaging the steam-engine itself. Equally close is the connexion between the steam-engine and the large machinery of the card manufactory, which from its unwieldy size could not be separated without injury or ruin to itself or the building to which it is attached, as to all machinery or utensils in that situation; and no one can doubt that they are all to be regarded as proper fixtures, and accessories of the solum or building with which they are incorporated. The decisions in the cases of Arkwright against Billinge, and Niven against Pitcairn, must be considered as fixing the law on this point. It has no doubt been maintained, that the decision in the case of Arkwright did not proceed so much on the idea of the subjects being in themselves heritable, as on the fact that the terms of the bond in favour of the creditor were wide enough to cover them, whether heritable or moveable, and that possession had followed. Even if this had been the ground on which, in Arkwright's case, the judgment proceeded, the present case comes within that principle. For here the security of the respondents being generally over John Stead's whole estate, and civil possession (i. e. the only possession pos-

sible) having followed, by drawing the rents payable for these subjects, they must be held as effectually transferred to them, even if their original character of heritable subjects were liable to doubt. The truth is, however, that in Arkwright's case the point was never disputed as to the steam-engine and large machinery. As to these it was taken for granted that the heritable security applied. The question was, as to its application to the smaller machinery only, and there it was found to apply in respect of the possession.

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LORD CHANCELLOR.—My Lords, I have been very much impressed in the course of the argument of the respondents by the considerations founded upon one part of the case, which I have not found to be displaced by the argument on the part of the appellant, either in the opening of the case or in the reply. I allude to the circumstances of the conduct of the bankrupt, of whose estate and effects the present appellant is assignee; by whose acts done before bankruptcy he is bound, and by whose homologation and affirmance he is bound, by whatever mode that affirmance is made, it not being supposed it was done fraudulently or to defraud the creditors, but giving the assignee a right of standing aloof from them. But, my Lords, though I certainly feel pressed by the argument that it is such as to make it impossible for me to get over it even if the rest of the case of the appellant was sufficient; nevertheless I should like to take a day or two to consider the point raised in the case, and if at that time, or on or before the last day of your Lordship's sitting, I should not alter the opinion I have, I should recommend your Lordships to affirm the judgment upon that ground as well as upon one or two others that I shall



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state, and I shall be disposed to recommend it should be affirmed with costs; for according to the view I have, it has been a very needless and useless proceeding.

I totally deny the doctrine attempted to be urged here, that because no reasons are given in the judgment of the Learned Judges, that there is therefore ground for appeal. It is a convenient course, certainly, for judges to assign the reasons of their judgment, and not to let it rest upon their own authority; but that it forms any thing like a ground of appeal, that a judge should affirm an order below or reverse an order below, though upon a reversal reasons generally are given and assigned, or that a judge should have refused the prayer of a petition without more, or have granted the prayer without assigning reasons, I deny. I am exceedingly baffled by that new doctrine; it is one extremely prejudicial to the conduct of judicial business; the consequence would be to throw impediments in the way of the despatch of business. I could name one Court, where a great deal of business is done as well as possible, and in which the reasons given would go into a very small compass indeed; I say that without any disparagement, but the practice there is not to argue the case at great length in giving the judgment. But if you will look into the judgment of many of the most learned judges who ever sat, and who have given judgment upon points arising before them in equity,—Lord Thurlow among others,—in the cases that came before him, your Lordships will search in vain through the volumes of Brown for any great length of argument in giving his judgment. The same may be said of Lord Loughborough; you will search in vain through the records of his decisions for any argument; he never omitted any part of the

question; but as to saying he assigned the reasons of his judgments, it was not the habit of that learned judge; it was not the habit of his eloquence, or in his judicial proceedings; but no man ever said that those judgments were not satisfactory, or did not meet the feelings and the views of the profession. It is in vain to say that a judge gives a reason because the reporter gives you half a page of print as falling from that judge;—that is not the reason. The appellant's counsel adverted to the reasons assigned specifically in writing by the judges, sometimes embodied in the interlocutor, sometimes given and appended by way of note to the interlocutor of the Lord Ordinary,—that is more commonly the case; sometimes the Lord Ordinary appends his reasons most attentively drawn; they are for the party to carry the case elsewhere to a court of appeal; that is the kind of reason; not the sentence thrown out by Lord Thurlow in these reports, nor those decisions where you will not find a distinct statement of the reasons, so that you can say the case was argued; you have something to show the ground of the decision, but not the argument of the Court. I have said so much to show I dissent from the proposition, that the absence of reasons forms any ground of appeal, and the want of those reasons shall form no reason for my not giving the costs of appeal against the appellant if I am right in the opinion I have formed upon the merits of the case; but I will consider it further before I dispose of it.

His Lordship on this day moved, and—

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House,

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and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the sum of two hundred pounds, for their costs in respect of the said appeal.

JOHN M'QUEEN — THOMAS DEANS,  
Solicitors.

[15th August 1834.]

JAMES DUNCAN, Trustee of Scougall and Company,  
Appellant. No. 28.

Mrs. ELIZABETH HOUSTON and others, Respondents.

*Diligence—Bankruptcy—Writ.*—The name of the debtor, in the Will of a caption, being written on an erasure,—Held (affirming the judgment of the Court of Session) that the caption did not afford legal evidence of bankruptcy, although the name was written correctly in the horning and charge, in the narrative of the caption, and the messenger's execution of search.

THE appellant, as trustee on the sequestrated estates of Scougall and Co., brought an action of reduction against the respondents before the Court of Session of certain deeds granted to them by the bankrupts, on the allegation that they were made and delivered within sixty days of the bankruptcy, and therefore were reducible under the act of parliament 1696, c. 5. The respondents stated various pleas in defence, but the only one necessary to be noticed is,—that there was no legal evidence of the bankruptcy, in respect that the diligence, in virtue of which it was said to have been constituted, was vitiated in essentialibus, and therefore improbativ.

1st DIVISION.  
Ld. Moncreiff.

The facts in regard to this point were these:—Scougall and Co., on 31st Jan. 1814, accepted a bill in favour of Robert Paterson, for 764*l.*, payable six months after date, drawn by James Brunton and Co., who indorsed it to John Paterson. When the bill fell due it was protested for nonpayment, and letters of horning were raised and executed, on the 9th of August,

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both against Scougall and Co., and Richard Scougall as the individual partner, and also against Brunton and Co., and James Brunton and James Thomson the partners thereof. The parties were denounced on the 16th; and so far the diligence was quite regular. On the same day letters of caption were expedite, which narrated "that upon the 16th day of August 1814 Richard Scougall and Co., merchants in Leith, as a company, and Richard Scougall, merchant in Leith, as an individual, and James Brunton and Co., merchants there, as a company, and *James Brunton and James Thomson*, merchants in Leith, as individuals, were orderly denounced rebels," &c. The words printed in italics were written on an erasure, but the name of Richard Scougall was not so. The Will then directed "our sheriffs to pass and apprehend the said *Richard Scougall, James Brunton, and James Thomson*," &c. These latter words, printed in italics, were all written on an erasure. An execution of search was returned by the messenger on the same day, which was correct.

The respondents contended, that as the words "Richard Scougall" in the Will were written on an erasure, they must be held *pro non scriptis*, and therefore there was no legal warrant to apprehend Scougall, and consequently no bankruptcy duly constituted. The appellant answered, that as the letters of horning, execution of charge, denunciation, and the narrative of the caption were unobjectionable, and directed against Richard Scougall, it was competent to refer back to them to show that the words appearing on the erasure were the only words which could have been meant to stand there, and that the erasure had been made merely to correct a clerical error.

The Lord Ordinary pronounced an articulate interlocutor on all the points in dispute, and specially found “that by the execution of search produced the “ company of Richard Scougall and Co. was, on the “ 16th August 1814, rendered legally bankrupt in “ terms of the act 1696.” His Lordship, at the same time, issued this note: — “The question whether “ Scougall and Co. were made legally bankrupt on the “ 16th August 1814, has been treated as involving “ various points. The Lord Ordinary is of opinion “ that there is but one point of difficulty. The letters “ of caption founded on (which were afterwards the “ ground of the sequestration) have the name of “ ‘Richard Scougall’ in the Will written on an erasure, “ in connexion with the names of the other persons “ charged, and the Lord Ordinary is sensible of the “ difficulty thereby created. The case of *Cowan v. Watt*, March 6th 1829, was quoted to him. That “ was a case of a warrant *sub meditatione fugæ*, which “ being an extraordinary remedy, liable to the strictest “ construction, the rule adopted might not be held to “ apply to cases of ordinary diligence. But the only “ question tried was, whether a bill of suspension and “ liberation should be passed. That did not necessarily “ determine the illegality of the warrant; it only im- “ ported that there was enough of doubt to render it “ just to liberate the prisoner. Upon the expedite “ letters, the warrant might still have been found legal “ after full discussion, and the party have been recom- “ mitted. In the present case it appears that in nar- “ rating the letters of horning the name of Richard “ Scougall and Co., and of Richard Scougall, as an in- “ dividual, are distinctly set forth as the parties charged,

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“ without any erasure; they were the acceptors of the  
 “ bill, the other parties to it were also charged, and  
 “ there is an erasure in the part where their names are  
 “ written. But this clearly is of no consequence.  
 “ Then, after a full narrative of the letters of horning,  
 “ the warrant or Will is, ‘to pass and apprehend the  
 “ ‘ said’ and the names ‘ Richard Scougall, James  
 “ ‘ Brunton, and James Thomson,’ are written on an  
 “ erasure. The letters of caption (signed by Mr. John  
 “ Russell, W. S.) are dated 16th August 1814, and  
 “ the execution on the back thereof is of the same date.  
 “ There is no averment on the record that the writ was  
 “ altered after passing the signet, and no ground to  
 “ suspect any fraudulent purpose. It may be taken,  
 “ therefore, as a blunder very inconsiderately cor-  
 “ rected before the letters were issued. Under these  
 “ circumstances, the Lord Ordinary, though not without  
 “ hesitation, has come to the opinion, that, as the first  
 “ part of the letters of caption shows, beyond all  
 “ doubt, that they were meant to be directed against  
 “ Richard Scougall, as a partner of the company, and  
 “ as on calling for the letters of horning he finds, from  
 “ the extract, that they and the execution of charge did  
 “ precisely warrant the caption, as it now stands, it  
 “ would be too strong to hold that the execution of  
 “ diligence (publicly and judicially acted on, and never  
 “ complained of) was rendered void and null by this  
 “ fault in the transcription of the letters of caption. It  
 “ was argued to the Lord Ordinary, and he thinks with  
 “ effect, that if the Will had stood blank in the names,  
 “ after the words ‘ the said,’ or had borne ‘ the said  
 “ ‘ persons,’ or ‘ the persons above designed,’ the warrant  
 “ would have been unexceptionable; and that in sub-

“ stance the case as it stands would be the same if the  
 “ names were held pro non scriptis. The point how-  
 “ ever is delicate and difficult, in so far as it might  
 “ involve a question of personal liberty.”

The respondents having reclaimed to the Inner House, their Lordships, on the 13th February 1833\*, pronounced this interlocutor:—“ In respect that the caption  
 “ produced to instruct the bankruptcy of Richard Scougall and Co. is not legal evidence to be received of the  
 “ requisites of the act of parliament made in the year  
 “ 1696, c. 5., libelled on, the names of the parties mentioned in the Will being written on an erasure, alter  
 “ the interlocutor of the Lord Ordinary reclaimed  
 “ against, and assoilzie the defenders from the conclusions of this action, and decern, but find no  
 “ expenses due.”

Duncan appealed.

*Appellant.*—Although the caption may be improbable with regard to Brunton and Thomson, whose names were written on erasures both in the narrative and in the Will, yet it is not so as to Scougall; his name is set forth in the narrative without erasure, and the Will could refer to him and to no one else. Besides, even if the name should be held blank, still as the relative term “said” is not written on an erasure, and as no other person could be referred to than Scougall, the objection is unavailing. Such a reference from one part of a document to another is quite legitimate, and has been repeatedly sanctioned.†

\* 11 S. & D. 383.

† Gordon v. Earl of Fife, 9th March 1827, 5 S. & D., 559; Morrison v. Nisbet, 30th June 1829, 7 S. & D. 810; Martin v. Hunter and Co., 26th Nov. 1830, 7 S. & D. 172; ante, vol. iv. p. 382.

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*Respondents.*—There could be no bankruptcy lawfully constituted unless there was legal diligence to accomplish the steps required by the statute.\* But the most important part of the diligence is the caption, and the most important part of that is the name of the party against whom the warrant is granted. If there be no name, no execution can take place. A name written on an erasure is equivalent to no name, as whatever is written on an erasure makes no faith.†

But it has been said that because the relative word “said” is not on an erasure, the Court may look back, and from the reference fill up the blank, as if it were correctly written. But an erasure is not a mere blank. It creates a presumption that other words have been formerly written, and new ones substituted, and the words so substituted must therefore be discarded. If the words originally placed could be of no materiality, then the erasure may be of no importance. But here the erasure must have been of the name of some other person than Scougall, and consequently the warrant was not originally against him. Even, however, if there had been a blank, free from erasure, a warrant to apprehend and imprison would not have been legal, nor would it have been competent to have read it as filled up with any particular name.

\* 2 Bell's Com. 170.

† Balfour, 368, 371, 382; Mack. Obs., p. 24; Craig, b. ii. tit. 5. sec. 214.; Stair, b. iv. tit. 42. sec. 19.; Erskine, b. iii. tit. 2. sec. 20.; A. v. B., 22d July 1625, Mor. 16925; M'Culloch v. M'Culloch, 27th July 1626, Mor. 6856; Pitillo v. Forrester, 23d Nov. 1671, Mor. 11536; Macdowall v. Kennedy's Representatives, 26th Nov. 1723, Mor. 17063; Merry v. Howie, 6th Feb. 1801, Mor. voce Writ, Appendix, No. 3.; Gibson v. Walker, 16th June 1809, Fac. Coll.; Innes v. Earl of Fife, 10th March 1827, 5 S. & D. 559; ante, vol ii. p. 637; Taylor v. Malcolm, 5th March 1829, 7 S. & D. 547; Elliot v. Johnstone, 26th June 1829, 7 S. & D. 1800; Cowan v. Watt, 6th March 1829, 7 S. & D. 553.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutor therein complained of be and the same is hereby affirmed; and it is further ordered, That the appellant do pay or cause to be paid to the said respondents the sum of two hundred pounds for their costs in respect of the said appeal.

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R. M. CRAWFORD—GREGGSON & FONNEREAU,  
Solicitors.

[15th August 1834.]\*

No. 29.

ARTHUR JOHN ROBERTSON, Appellant.

Mrs. MARY SHEARER, or ROBERTSON, Respondent.

*Husband and Wife — Adjudication.* — Circumstances in which it was held (affirming the judgments of the Court of Session), that the *jus mariti* was excluded as to the interest on two heritable bonds, in which the husband was debtor and the wife creditor; and that adjudications accumulating the principal and interest in her favour were valid.

1ST DIVISION.  
—  
Lord Cockburn.

THE late Masterton Robertson, son of Arthur Robertson, Esq., of Inches, was married in the year 1802 to the respondent Mrs. Mary Shearer or Robertson, and the appellant was the only surviving child of the marriage. In 1804 Masterton Robertson purchased a small property adjoining to the family estate of Inches; and, for payment of part of the price, he borrowed from Mrs. Nelly Shearer, the sister of his wife, a sum of 1,400*l.*, for which he granted in favour of Miss Shearer an heritable bond over the property, in virtue of which she was infert; and, at the same time, Mr. Arthur Robertson (the father) granted a separate collateral bond for the regular payment of the interest. Miss Shearer died, leaving a disposition and deed of settlement in favour of trustees, by which she conveyed to them her whole property, including the heritable

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\* This and the following cases were decided in 1835, but were, from accidental circumstances, omitted to be reported under their proper dates. They have been therefore introduced into this volume. The correct date of the above case is 10th July 1835.

bond for 1,400*l.* and the collateral bond for payment of the interest. By this deed she directed her trustees to pay to her sister Mrs. Robertson, “but exclusive of the *jus mariti* of her said husband, 700*l.* sterling, and ten guineas for mournings;” and also “to divide my watch, trinkets, rings, wearing apparel, and whole household furniture,” among her sisters, including Mrs. Robertson; “and, in the last place, I hereby direct and appoint the said trustees to pay over the free residue of my real and personal estates” to her sisters, including Mrs. Robertson, “equally among them, but exclusive always of the *jus mariti* of their husbands.”

In part satisfaction of the provisions thus made in favour of Mrs. Robertson, the trustees, on the 30th of October 1807, executed an assignation in her favour of the heritable bond for 1,400*l.* and the collateral bond for payment of the interest. The deed proceeded on the narrative of Miss Shearer’s trust disposition, and that, in part implement thereof, the trustees “make, constitute, and appoint the said Mary Robertson, otherwise Shearer, and her foresaids\*, but exclusive of the *jus mariti* of her said husband, not only in and to the principal sum of 1,400*l.* sterling, and annual rents thereof from and since the term of Martinmas 1806, during the non-redemption, &c., all contained in and due by the bond and disposition in security granted by the said Masterton Robertson, Esquire, to the said Miss Nelly Shearer, of date, &c., and by her conveyed to us by the trust disposition and settlement before mentioned, together with the collateral obliga-

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“ tion for the payment of the interest thereon granted  
 “ by Arthur Robertson, Esquire, of Inches, of date,”  
 &c., “ turning and transferring the whole premises from  
 “ us and our foresaids to and in favour of the said  
 “ Mary Robertson, otherwise Shearer, and her fore-  
 “ saids, whom we hereby surrogate and substitute in  
 “ our full right and place thereof for ever, with power  
 “ to them to intromit,” &c. In virtue of this assigna-  
 tion Mrs. Robertson was duly infeft in September  
 1808.

The pecuniary affairs of Masterton Robertson were in great embarrassment; and it was alleged by the respondent, that all the money which he possessed was obtained by him, either from the trustees in her name, or was given by her to him on the footing of a debt. On the 10th of July he addressed a letter to the trustees in these terms:—“ Whereas I have this day  
 “ granted you my promissory note for 1,166*l.*, as trus-  
 “ tees for Mrs. Robertson, payable at one day’s date, I  
 “ shall, whenever I get home, send you a description  
 “ of my lands of Wester Inches and Bogbain, and my  
 “ lands of Ross of Inches, and the Dell, and others  
 “ lately purchased by me, that you may make out a  
 “ corroboration bond and disposition in security over  
 “ these lands by me for her behoof, for the above prin-  
 “ cipal sum, exclusive of my own jus mariti, both as to  
 “ principal and interest, which I bind and oblige me  
 “ and my heirs and successors to subscribe and execute  
 “ whenever required by you.” The bond was not at this time executed; and on the 22d of December 1814 he wrote to Mrs. Robertson,—“ Do not be the least uneasy  
 “ about money matters. You shall not want. I shall  
 “ bring you money as you want. I shall bring all my

“ charters with me. You know it was the hurry  
 “ Mr. Grant and me were in prevented it being settled  
 “ here. You have the inventory of the furniture with  
 “ you. I shall grant my bill also for that. You know  
 “ I have several things to add to it that you wish; so  
 “ keep your mind easy upon that and every other score  
 “ till we meet, which I hope will be soon.”

He afterwards came to Edinburgh, where his wife was; and an heritable bond for 1,500*l.* being prepared by the agent for the trustees in favour of his wife, he subscribed it on the 17th of March 1815. The narrative of this deed set forth, that he had “ borrowed and received from  
 “ Mrs. Mary Robertson, my spouse, at the term of  
 “ Martinmas last, the sum of 1,500*l.* sterling, whereof  
 “ I hereby acknowledge the receipt, renouncing all  
 “ exceptions to the contrary; which sum is hereby  
 “ declared to be exclusive of my jus mariti, both as to  
 “ the principal and interest, and shall in no respect be  
 “ subject to my debts or deeds, but shall be at the dis-  
 “ posal of the said Mrs. Mary Robertson in any  
 “ manner she shall think proper; and which sum of  
 “ 1,500*l.* is composed of various sums, principal and  
 “ interest due thereon, paid by the said Mrs. Robertson  
 “ to me, amounting as at present to the sum of 1,500*l.*;  
 “ and which sum of money belonged to the said  
 “ Mrs. Mary Robertson by the disposition and settle-  
 “ ment of the late Mrs. Nelly Shearer, aunt to my  
 “ said spouse, to certain trustees therein mentioned,  
 “ which disposition and settlement expressly excludes  
 “ my jus mariti from the said sum, principal and  
 “ interest.” He therefore bound and obliged himself  
 to repay “ the said sum of 1,500*l.* to the said Mrs. Ro-  
 “ bertson, her heirs or assignees, exclusive of the said

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No. 29. “ jus mariti of me, her said husband, in manner above  
 15th August “ mentioned, at the term of Whitsunday 1816, &c.,  
 1834. “ with interest termly thereafter, in case of non-  
 ROBERTSON “ payment.”  
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About the same time his father died, and he succeeded as heir of entail to the estate of Inches; but being still greatly embarrassed, he executed, in February 1817, a conveyance of his whole estates to trustees for behoof of creditors. Mrs. Robertson, in the following year, raised two separate actions of adjudication, with concurrence of a curator ad litem, on the two bonds for 1,400*l.* and 1,500*l.*; and on the 5th of June 1818 she obtained separate decrees of adjudication. The arrears of interest on the 1,400*l.* bond were accumulated, and, with principal, amounted to 1,680*l.*; and in like manner, the arrears of interest on the 1,500*l.* bond were accumulated, and amounted to 2,020*l.*

Her husband died in 1822; and she then agreed to restrict her claim of terce. The trustees rendered her a state of accounts in 1824, in which they debited her with payments made to her since her husband's death, and gave her credit for the interest on the two separate bonds, and her allowance for terce. In April 1825 the trustees conveyed to her son, the appellant, the estates which remained undisposed of, under the burden of paying the debts due by his father, which the trustees had not settled; and the appellant subscribed this deed in token of his consent. It was alleged by the respondent, that posterior thereto he did various acts and deeds homologating the bonds.

In 1833 the appellant brought two separate actions of reduction and improbation; the one being directed against the adjudication which had been obtained in virtue of the

bond for 1,400*l.*, — and the other against the bond for 1,500*l.*, and the adjudication deduced thereon. This latter action was libelled mainly on allegations of facility and incapacity on the part of his father, and of fraud and misrepresentation or undue concealment on the part of his mother. But eventually he departed from all these allegations, and confined his plea to the ground (which was common to both actions), that the exclusion of the *jus mariti* could be held to apply only to the interest which was due at the date of the bonds, and not to the future interest accruing annually; and that as the adjudications included that interest he was entitled to have them set aside to that extent. On the other hand, the respondent maintained, that the exclusion of the *jus mariti*, according to a sound construction, embraced the future interest, as well as that existing at the date of the bonds, and that the decrees of adjudication were properly taken for the accumulated amount.

The Lord Ordinary assoilzied the respondent in both actions, on the 27th of November 1834, with expenses; and in the action on the bond for 1,400*l.* he issued this note: — “ The whole case depends on the  
 “ point, whether the *jus mariti* of the defender’s de-  
 “ ceased husband was or was not excluded, not only  
 “ quoad the principal sum, but quoad the interest  
 “ of the bond on which the adjudication was led.  
 “ Miss Nelly Shearer, the aunt of the defender, held  
 “ a bond, by which the defender’s husband bound  
 “ himself to pay the 1,400*l.*, together with the legal  
 “ interest. She also held a separate obligation by his  
 “ father for the interest. Miss Shearer died, leaving a  
 “ special legacy to the defender, and dividing the whole  
 “ free residue ‘ of my real and personal estates ’ among

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No. 29. “ her and other three ladies, ‘ but exclusive always of  
 “ ‘ the jus mariti of their husbands.’ Miss Shearer’s  
 15th August “ trustees conveyed the foresaid bond for 1,400*l.* to the  
 1834. “ defender, to account of her claims under their author’s  
 ROBERTSON “ settlement. Their conveyance (not brought under  
 v. “ reduction) is awkwardly expressed, owing to the ac-  
 ROBERTSON. “ cidental omission of the words, ‘ our cessioners and  
 “ ‘ assignees,’ or some such words. But no plea is  
 “ maintained on this; and the deed plainly enough  
 “ assigns, ‘ not only the principal sum and annual  
 “ ‘ rents thereof,’ together with the collateral obligation  
 “ for the payment of the interest granted by Arthur  
 “ Robertson, Esq., of Inches, but also the bond, &c.,  
 “ with the said obligation, and all expressly exclusive  
 “ of the jus mariti. And even though the jus mariti  
 “ had not been excluded quoad the interest, the effect  
 “ of the defender’s adjudication in making the future  
 “ interest heritable would be an answer to the pur-  
 “ suer’s conclusion, which is, that these being moveable,  
 “ belong to him.”

In the other action his Lordship issued this note:—  
 “ At the debate the pursuer abandoned all his state-  
 “ ments and reasons of reduction and pleas in law,  
 “ which were founded on alleged fraud, facility, in-  
 “ capacity, misrepresentation, or undue concealment,  
 “ and confined himself exclusively to the third plea in  
 “ law, under which he maintained that the jus mariti  
 “ was not excluded quoad the interest of the bond. On  
 “ this the Lord Ordinary refers to his note in the other  
 “ case about the 1,400*l.* bond between the said parties,  
 “ only the record in this case contains a letter from the  
 “ pursuer’s father, by which he agrees to the exclusion  
 “ of his jus mariti expressly in reference to the interest.”

The appellant reclaimed to the First Division of the Court, but their Lordships, on the 10th February 1835, adhered.\*

Robertson appealed.

*Appellant.*—It is settled law that the current interest or annual rents of heritable sums falling due during the marriage belong to the husband *jure mariti*.† The *jus mariti* confers not merely a right to claim the property which is of a moveable nature, but has the effect to vest the right *ipso jure* in the husband. It may, no doubt, be excluded, but this must be done in terms so clear and explicit as to leave no doubt on the subject. The plain intention was, and the legal meaning is, both with reference to the bond for 1,400*l.* and that for 1,500*l.* that the exclusion should be confined to the principal sum itself, and not extend to the future interests. If the appellant be correct in this, then the adjudications were erroneous, in so far as related to the accumulated interest, because that interest belonged not to the respondent but to her husband.

*Respondent.*—The question simply is, who was creditor under the bonds for the principal sum and interests? The respondent maintains that her husband was debtor for both, and that whether the terms of the bonds themselves be regarded or the letters written by him, it is clear that it was the intention and meaning of the parties that his *jus mariti* should be excluded, not only in

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\* 13 S. & D., 442.

† Brown's Synopsis, vol. ii. p. 878 to 880.

No.29. relation to the principal sums, but also to the interests.  
 15th August Such an exclusion is perfectly competent, and has been  
 1834. repeatedly sustained. Besides, the interest for which  
 ROBERTSON the adjudication was obtained was not past interest but  
 v. future. The former is moveable, and falls under the  
 ROBERTSON. jus mariti, but that which is future and prospective is  
 heritable.\*

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed : And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

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\* Ersk. b. ii. tit. 12. sec. 45 ; Ramsay v. Brownlee, 1st Dec. 1738, Mor. 5538 ; Baikie v. Sinclair, 16th Jan. 1786, Mor. 5535 ; Ryder v. Ross, 1st July 1794, Mor. 5549.

JOHN M'QUEEN — RICHARDSON and CONNELL,  
 Solicitors.

[15th August 1834.] \*

ALEXANDER WATSON, Appellant.— *Dr. Lushington* — No. 30.  
*A. M'Niel.*

ANN WATSON and ISABELLA WATSON, Respondents.—  
*Sir Wm. Follett—Pyper.*

*Service.*—After a party had been served heir, another party obtained a service as heir by a nearer degree, and brought an action of reduction of the service of the party first served. The latter having brought a counter reduction, the Lord Ordinary, in that process, allowed the party second served a supplementary proof, and sisted the other action; and the Court, on advising the proof and supplementary proof, assolized from the counter reduction. But the House of Lords remitted to frame an issue or issues to try the propinquity of the parties respectively to the deceased.

ALEXANDER Watson and Mary Marshall, residing in Greenock, had three sons, John, James, and William. John had an only son, Alexander, who was a writer in and town clerk of Port Glasgow. James, who was a messenger in Edinburgh, died in 1789 without issue. Alexander the town clerk died on the 11th of September

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\* This case was decided on 27th August 1835.

No. 30. 1825, also without issue, possessed of heritable and moveable property of considerable value. William M'Naught, writer in Port Glasgow, was appointed judicial factor on the estate. On the 17th of November 1827 the appellant, Alexander Watson, weaver in Houston, obtained himself served, before the Magistrates of Renfrew, heir to the town clerk, as descended from a grand uncle. On the 11th of December 1827, and 4th of October 1828, caveats were lodged in chancery by the appellant, requiring notice to be given to him in case any other party should apply for a brief to be served. The respondents, on the 8th of April 1829, obtained a brief from chancery to be served heirs portioners of Alexander Watson the town clerk, on the allegation that they were daughters of William Watson, a weaver at Moneddie, in Perthshire, who they averred was the son of old Alexander Watson and Mary Marshall. No notice was given to the appellant that such a brief had been issued; and the respondents, in his absence and without his knowledge, obtained themselves served before the sheriff substitute of Perth as nearest lawful heirs of Alexander Watson, the town clerk.

In the meantime the appellant had expedite an edict as executor, for the purpose of obtaining possession of the moveable funds, but he was opposed by the judicial factor on an allegation that he was not the nearest heir; and on the respondents being served, appearance was made by one of their aunts, who claimed the character of next of kin. Two other aunts were adduced, and admitted as witnesses in the service before the sheriff of Perth.

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Immediately on obtaining their service the respondents raised an action of reduction of the service of the appellant, on the ground that as he had been served heir in a more remote degree than the respondents his service was necessarily excluded by their service in the nearer degree; and they also made certain formal objections to the regularity of his service. The appellant raised a counter action of reduction of the respondents service, on the ground, first, that the respondents were in no way related to the town clerk, as the William Watson from whom they were descended was not a son of Alexander Watson and Mary Marshall, that the pedigree which they had framed was false, and had been manufactured by them, with the assistance of certain other parties, that their service had been obtained by the testimony of their own near relations, who, if successful, would have right to the executry, and also by other incompetent evidence; and, second, that the service was incompetent, in respect that it had been expedite posterior to that in favour of the appellant, and that, notwithstanding the caveats, no notice had been given to him of the issuing of the brief.

The Lord Ordinary, after the record was closed, pronounced this interlocutor in the action at the instance of the appellant:—“ Before answer as to any points in  
 “ the cause, in respect that the defenders offer to support the proof of their propinquity as set forth in  
 “ their claim in the service under reduction by other  
 “ and supplementary evidence, 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 com-

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No. 80. “ mission, &c., reserving all questions as to the other  
 15th August “ grounds of reduction, and reserving all questions as to  
 1834. “ the competency and effect of the evidence already ad-  
 WATSON “ duced.” His Lordship at the same time pronounced  
 v. “ the following interlocutor in the action at the respon-  
 WATSONS. dents instance:—“In respect of the interlocutor pro-  
 “ nounced of this date in the counter action of re-  
 “ duction betwixt the parties, sists farther procedure  
 “ in this process hoc statu.”

A supplementary proof was accordingly adduced before the commissioner; and the respondents having objected to a particular line of evidence proposed to be entered on by the appellant, the Lord Ordinary pronounced this interlocutor:—“ Finds it is competent  
 “ for the pursuer, under the conjunct proof allowed  
 “ to him, to prove all facts embraced by his conde-  
 “ scendance, tending to show that the alleged pedigree  
 “ or line of propinquity founded on by the defenders  
 “ 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 appear-  
 “ ing to investigate 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 this  
 “ 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 falsehood 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 farther relevancy to meet the inference dedu-  
 “ cible 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.”

The proof having been concluded, and reported to the Lord Ordinary, his Lordship appointed the questions to be argued in Cases, and at the same time issued this note: —“ The Lord Ordinary has not been able, since the  
 “ debate was concluded, to consider the proof, and the  
 “ various points of argument 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  
 “ reduction, 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  
 “ Isabel 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 was in a nearer degree. But  
 “ if it should be the opinion of the Court that the  
 “ propinquity of the defenders is not proved, it may  
 “ not necessarily follow that their service is to be re-  
 “ duced 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 propin-

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“quity 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.”

On advising the Cases the Court, on the 25th of February 1835, repelled the reasons of reduction, assolizied the respondents, but found no expenses due.\*

Alexander Watson appealed, and resumed in detail the argument maintained by him in the Court below, that the service obtained by the respondents ought to be set aside as irregular; and that at all events the evidence by which it was supported was incompetent and insufficient.

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\* 13 S. & D. 543. The following statement as to what occurred at the advising was made by the appellant in his Case laid before the House of Lords:—“The Court seemed to think that the case just resolved into a competition of brieves,—that both parties should be placed on an equal footing,—that a supplementary proof might still be allowed to the appellant in the action at his instance if desired, as the sist could not prevent the Court from having that action before them, if necessary,—that although the respondents proof might be found to be insufficient, the appellant’s might be worse; and their Lordships delayed the case till next day, that this view of the case, as well as the bearing of the proof, might be considered, and the appellant’s counsel heard in point of form, if necessary. On the 25th, accordingly, the cause was called again, when, much to the surprise of the appellant, and without any farther discussion from the bar, the Court being of opinion that the respondents, who claimed as nearer heirs than the appellant claimed to be, had made out their propinquity, it became unnecessary to discuss farther the suggestions as to the form of proceeding.” On the 3d of March thereafter the sist in the other action was recalled, and decree pronounced in favour of the respondents.

The respondents, on the other hand, maintained that they were not bound to notify their intention to expedite a service; and that the evidence was competent and sufficient.

At the termination of the argument a suggestion was made by Lord Brougham that the case should be extrajudicially arranged, and for this purpose judgment was delayed. On a future day, it having been stated from the bar that no arrangement had taken place, the following observations were made:—

*Lord Brougham.*—I have looked into the case. I differ from the judgment. I think it is a wrong decision. I am clear, indeed, that it is a wrong decision; it does not go upon the evidence. The parties must have an issue to prove their propinquity; there must be two issues.

*Dr. Lushington.*—There is one observation which I feel it necessary to make, with respect to the examination of one or two of our principal witnesses. One of them, who was examined in 1829, a person of the name of Gloag, was of the age of eighty at that time, and he is now, of course, eighty-six.

*Lord Brougham.*—You may apply, and obtain the usual order; it is frequently made in courts of equity, where it appears that any of the witnesses previously examined are dead, or they are proved, to the satisfaction of the Court, to be unable, from bodily infirmity, to give evidence; their depositions in that case may be read; but then the Court must be satisfied that it is a deposition made on an inquiry in which both parties were present.

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*Sir William Follett.*—Does your Lordship think that should be done by this House?

*Lord Brougham.*—In England it would rest with a court of equity, in directing an issue, to give that direction; and the evidence of a witness who had died, or who had become incapable from bodily infirmity, would be receivable under such direction, the fact being proved. I do not know whether that is the case in the Scotch courts. I think the case requires that there should be such a direction here.

*Dr. Lushington.*—Then, supposing it proved that any of the witnesses are incapable of being examined in consequence of death, or being utterly incompetent from bodily illness or mental infirmity, we are to have an order to read their depositions.

*Lord Brougham.*—It is the frequent practice of the Court of Chancery; therefore, as we are directing the issue, I do not see that there is any harm in that being provided for.\*

*Sir William Follett.*—With respect to the form of the issue, my learned friend assumes that the issue is to be as to the right of each party. The appellant is interested in opposing the pedigree of the respondents; for they claim as nearer relatives of the party deceased than the appellant.

*Lord Brougham.*—Is your action an action of reduction of their service?

*Sir William Follett.*—Yes, my Lord.

*Lord Brougham.*—Then, if you show that they are not propinquier hæres, or rather if you show that you

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\* It will be observed that the proposed order was not inserted in the judgment.

are, (and; indeed, unless you do that you have no locus standi in judicio, you have no right to be in court, but under the character of being propinquior hæres,) you may prevail.

*Sir William Follett.*—Does your Lordship mean to say it is an issue directed by this House?

*Lord Brougham.*—We remit from this House, with directions to the Court below to direct an issue.

*Sir William Follett.*—As to who is to be plaintiff and who defendant, and so on, that is to be left to the Court below.

*Lord Brougham.*—We always leave that to the Court below in this country. The Court below ought to consider, as we do in the Court of Chancery, not who, formally speaking, is the actor, but who in substance and reality is the actor; and the proof must be thrown upon him.

*Sir William Follett.*—Does your Lordship think that the costs ought to be paid out of the fund?

*Lord Brougham.*—Yes; they have directed that in the Court below.

*Sir William Follett.*—Your Lordship means the costs of both parties?

*Lord Brougham.*—Yes, certainly; but when we are charging the fund with the costs, they must be taxed by the proper officer.

The House of Lords ordered and adjudged, That the said cause be remitted back to the Court of Session in Scotland, with instructions to recall the interlocutor complained of, and to direct one or more issue or issues to be framed to try the propinquity of the parties respectively to the deceased Alexander Watson, town clerk of Port Glasgow, and that such issue or issues be tried accordingly :

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And it is further ordered, That the costs of both parties of the appeal, as the same shall be taxed and certified by the proper officer of this House, be paid out of the fund under charge of the judicial factor on the estate of the said Alexander Watson, deceased; and that the said Court of Session do grant warrant accordingly for payment of the sums, to be taxed and certified as aforesaid, to the solicitors and the parties respectively: And it is further ordered, That the said Court of Session do proceed further in the said cause as shall be just, and consistent with this judgment.

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\* In consequence of this remit issues were sent to a jury, who, on the 10th of May 1836, 14 D. 734, found a verdict for the appellant. The respondents having presented a bill of exceptions, the Court, on the 7th of March 1837, 15 D. 753, allowed the bill, and set aside the verdict. The question, it is believed, was afterwards settled by a decree arbitral.

THOMAS DEANS—ANDREW M'CRAE, Solicitors.

[15th August 1834.]\*

Lieutenant Colonel GORDON, Appellant.  
*Sir W. Follett—Shaw.*

No. 31.

JOHN ANDERSON and others, Respondents.  
*Dr. Lushington—Spalding.*

*Reparation.*—Circumstances under which it was found (affirming the judgment of the Court of Session) that tenants were not liable in damages to their landlord for a failure to use the fodder of the crop of the last year of their lease on the farm.

IN the month of May 1801 the respondent, John Anderson, who was then in possession, as tenant, of the farm of Kirktown of Slaines, addressed to the appellant, the proprietor, an offer for a lease for twenty-one years from Martinmas then next, which was made and accepted on the footing that he was to be bound by certain general regulations applicable to the whole estate. One of these regulations (the 16th) was thus expressed:—“ The  
 “ whole fodder to be used upon the ground, and none  
 “ sold or carried away at any time, hay only excepted,  
 “ and all the dung to be laid upon the farm the last  
 “ year of the lease.” Anderson continued in possession, in virtue of this lease, and sub-let part of the farm to other parties. Crop 1822 was his last crop; and Anderson having intimated his intention to carry it away, and to dispose of it for his own benefit, the appellant, on the

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Lord Fullerton.

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\* The true date is 31st August 1835, the case having been omitted to be reported along with those of 1835.

No.31. 6th of August 1822, presented a petition to the Sheriff  
 of Aberdeenshire, praying him to ordain Anderson and  
 his sub tenants “ to use the fodder of the present crop  
 “ upon the farm of Kirktown and others foresaid, and  
 “ in the meantime to prohibit and discharge them, and  
 “ each of them, from carrying off any part of the fodder  
 “ of the said farms, hay excepted, until parties are  
 “ heard, and this action decided,” &c. The Sheriff  
 having pronounced judgment in favour of Anderson,  
 the appellant brought the case under review of the  
 Court of Session; and on the 10th of March 1825,  
 their Lordships, after consulting all the Judges, found  
 “ that the 16th article of the general articles of lease  
 “ regarding the estate of Cluny (Slaines) cannot be  
 “ held as applying to the crop of the last year of the  
 “ lease; and that the rights of the parties respecting  
 “ the same must be regulated by the common law and  
 “ usage of the country; and therefore repelled the rea-  
 “ sons of advocacy, and remitted the case simpliciter  
 “ to the Sheriff,” and found expenses due. On appeal  
 by Colonel Gordon this judgment was reversed on the  
 15th of February 1828.\*

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In the meantime, viz. in March 1823, the respon-  
 dents, Anderson and his sub-tenants, made the fol-  
 lowing offer to the appellant, under form of a  
 notarial instrument of protest:—1. “ To give over  
 “ to the said John Gordon, Esq., or, with his con-  
 “ sent, to the present tenant of the said farms, the whole  
 “ of the fodder or straw stacked upon the said farms at  
 “ a fair valuation, to be put thereon by any two respec-  
 “ table farmers in the neighbourhood—one to be chosen

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\* See ante, vol. iii. p. 1.

“ by each party; and in the event of difference of opi-  
 “ nion, by any oversman to be named by these valuator,  
 “ the value so fixed to be consigned immediately there-  
 “ after in any responsible banking house in Scotland,  
 “ in the joint names of the parties, until the issue of  
 “ the cause, when the amount will fall to be paid. Or,  
 “ secondly, in the event of the said John Gordon declin-  
 “ ing the foresaid offer, they propose that the said fodder  
 “ or straw so stacked upon the foresaid farms should be  
 “ exposed to public sale after due advertisement,—the  
 “ said sale to be conducted and superintended by any  
 “ two respectable individuals, one to be named by each  
 “ party; and the free proceeds of the sale, deducting  
 “ all necessary expenses, to be immediately thereafter  
 “ consigned in any responsible banking house in Scot-  
 “ land in the joint names of the parties, there to remain  
 “ until the final issue of the cause, and thereupon to  
 “ be paid over to the successful party. And, lastly, in  
 “ the event of both offers being declined, they protested  
 “ that the foresaid fodder is at present worth at the rate  
 “ of at least 11s. sterling per boll of grain, and that the  
 “ said John Gordon, Esq., should be liable to account  
 “ to them at the present value thereof;” reserving  
 all the pleas of parties.

In answer to this protest Colonel Gordon stated that  
 he had long previously “ offered to give them accom-  
 “ modation of houses at Kirktown of Slaines for the  
 “ consumption of the fodder of the last crop of that  
 “ farm, which offer they did not accept, although, if they  
 “ had done so, the whole of the said fodder might have  
 “ been long ago consumed on the farm; that he is  
 “ still willing to give them that accommodation; that  
 “ his chief object in view always was to have the fodder

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No. 31. “ converted into manure upon the farm ; and that, if  
 15th August “ they did not choose to do so themselves, they might  
 1834. “ sell the fodder by roup, under the express condition  
 GORDON “ that it shall not be carried off, but be actually con-  
 v. “ sumed on the farm ; and that, if the fodder shall be  
 ANDERSON. “ sold under that condition, accommodation of houses  
 “ shall be given at Kirktown for the consumpt thereof  
 “ by the purchaser.”

Thereafter, in the month of June, the straw was valued by judicial inspectors at 118*l.* 2*s.* 6*d.*, who reported that it “ would have been worth one third more value, provided it had been properly cured, which it has not been, as it has never been thatched, which it ought to have been at the time it was put up, or when it was thrashed out.”

In October of the same year, Colonel Gordon raised an action of damages before the Court of Session against the respondents, setting forth that they “ have failed to use the fodder of said way-going crop 1822 upon the ground of the said lands, in terms of the foresaid articles and regulations, and have prevented the pursuer from using it, or converting it into dung, whereby it is now greatly lessened in value ; and the defenders have thus subjected themselves in damages to the pursuer.” The proceedings in this process were delayed till the issue of the principal cause, and were resumed on the judgment of reversal being pronounced.

In defence the respondents pleaded, that although it had been finally settled that they were not entitled to carry away or dispose of the fodder, yet it had not been decided whether, under the article of the regulations founded on, they were bound to use the fodder upon the ground ; and they maintained that, in fair construction, all that

was incumbent on them was to leave it so that it might be used upon the ground by the appellant or the succeeding tenant; that if any loss had been sustained by the appellant, it had been caused by his own conduct in not acceding to the offers made by the respondents; and that he could make no claim against them, in respect that they were not lucrati, and had acted in bonâ fide in the judicial proceedings which had taken place.

The Lord Ordinary, “in respect there are raised in “the record questions of law, and in particular as to “the construction of a judgment of the House of “Lords,” reported the cause to the Court on Cases; and on advising them, their Lordships, on the 24th of May 1833, pronounced this interlocutor:—“In the “whole circumstances of the case, find no damages due; “sustain the defences, and assoilzie the defenders from “the conclusions of the libel, and decern;” and found expenses due.\*

Colonel Gordon appealed.

*Appellant.*—It is now a fixed point that the respondents are bound by the articles and conditions, and particularly by the 16th, by which it was stipulated that the whole fodder was to be used upon the ground, and none sold or carried away at any time. It is admitted that during the currency of the lease the fodder was to be used and converted into dung by the respondents, for the benefit of the land; and there is no distinction

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as to the last year of the lease. On the contrary, the obligation is general; and it is expressly provided that the dung shall be laid on the land the last year of the lease. The respondents never alleged, till the issue of the main question, that it was competent for the appellant to make use of the fodder on the ground. Their plea, on the contrary, was, that they were entitled to carry it off, and dispose of it at their pleasure. The Judges in the Court below, in pronouncing the judgment appealed against, gave it as their opinion that the respondents were the parties who were bound to use the fodder on the ground; but, without assigning any specific reason, found that, under all the circumstances, they were not bound to make reparation to the appellant for their failure to implement this obligation. There were no circumstances, however, relevant to relieve them. If they required accommodation for the purpose, they were bound to show that they had applied for and been refused it; but so far from this being the case, the appellant spontaneously offered to give them such accommodation, both prior and posterior to the protest. It is of no relevancy to allege that the respondents are not *lucrati*; it is sufficient that, by their illegal act, the appellant has sustained loss and damage. Neither is it of any relevancy, that they acted in *bonâ fide*. In a question as to repetition of fruits or rents *bona fides* may be of importance, but it is of no materiality in a question of the present nature.

*Respondents.*—The judgment of this House was not intended to affect, and does not affect, the question as to the construction of the stipulation founded on by the

appellant. If the construction contended for by him were correct, it could not practically have been carried into execution. The crop of the last year could not be reaped till immediately preceding the out-going term; and before it could be thrashed, that term must have expired, and a new tenant have come into the premises. It was thus in the power of the appellant, as proprietor, or of that new tenant, to make use of it, by converting it into dung, and laying it on the ground, but it was impossible for the respondents to do so; and if it had been the intention of the parties that the respondents were to use it on the ground, provision would have been made for enabling them to do so, and they would not have been left dependent on the pleasure or caprice of the appellant as to accommodation for that purpose. In the absence, therefore, of express stipulation, it must be presumed that it was not the intention of the parties that the obligation to consume the fodder was to be performed by the respondents.

But even if it were to be held that it was incumbent on them to do so, still, under the peculiar circumstances of this case, there are no just grounds for finding them liable in expenses. Both the Sheriff, and all the Judges of the Court of Session, were of opinion, not only that the respondents were not bound to consume the fodder on the ground, but that it belonged to them in property, and that they were entitled to dispose of it for their own benefit. It is true that this House arrived at an opposite conclusion; but in the meanwhile the respondents had done every thing in their power to provide against the possibility of loss, and the appellant had rejected all their propositions. He has himself, therefore, to blame, if the fodder, which was of a perishable

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nature, has been lost or depreciated in value, and he cannot be allowed to make that loss effectual against the respondents.

LORD BROUGHAM.—My Lords, there are one or two circumstances in this case upon which I should take time for consideration, not only as to the arguments urged to-day, but how far the Court below was right in the construction which it put on the order of your Lordships; and indeed what construction their Lordships in the Court below did put on that, for I think that remains in a state of considerable doubt, after all that I have heard on either side of the bar. It has been ably argued on both sides; and as far as we have any lights upon it from the documents in the cause, those lights have been taken advantage of by the learned counsel; still I should wish to have further information; and if I continue to have any doubt (it is important the thing should be distinctly understood) I shall be obliged, as I frequently have been before, to have communication with the Learned Judges in the Court below. That is always however to be avoided if it can be; I always wish to be able to decide a case, or rather to advise your Lordships to decide a case, here without the necessity of that course; because, though I endeavour to give my view of the case, and to give the arguments used on both sides as distinctly and fairly as I can in my correspondence with the Learned Judges, it is quite clear I do not give them exactly in the way in which either of the counsel, if they were heard before those Learned Judges, would be inclined to give them. I give them according to my sense of them, perhaps differing from the learned counsel in their view of their own arguments;

consequently I avoid this as much as possible, chiefly confining those communications to my own doubts, without the necessity of stating the arguments of counsel ; and above all to remove my doubts as to the meaning of the Learned Judges, from the imperfectness of the report, or from their giving short judgments, which their Lordships perhaps are too much in the habit of doing.

My Lords, there is another reason why I wish to have this well considered, and to have that communication, if consideration should render it necessary or advisable ;— and that is, that I do not quite understand the sort of language used by some of the Learned Judges respecting the decisions of this House. It is quite clear that they are bound to submit to the decisions of this House, and they ought to submit in silence. It is not sufficient for a judge in the Court below to say, I submit by force, but I tell all the liege subjects of the kingdom that the House of Lords have decided wrong, that they are perfectly ignorant of Scotch law,—which they are not, for they keep the Scotch judges right. We have reversed three or four important Scotch cases, and the Learned Judges were unanimous in their decisions which we altered, and the Learned Judges themselves admitted that the House of Lords were right. In the Duntreath case Lord Mansfield reversed a decision on the law of real property in Scotland which the courts had come to ; they thought it wrong, and struggled a little against the judgment here ; but every Scotch lawyer, within five years after that judgment was pronounced, admitted that it restored the Scotch law. Many believed the Herbertshire case, which I decided, restored the Scotch law. My opinion is, that the Herbertshire case was com-

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pletely a deviation from the Duntreath case ; and if it had remained in the books it would have injured the Scotch law. It was the opinion of the judges that we were right in that case ; just as much as we were right in the Herbertshire case we were right in the Duntreath case. My Lords, I think there are exaggerations in these reports of what fell from the Learned Judges. I do not think it is fair to those learned persons to suppose they used the indecorous expressions which sometimes counsel are instructed to put into their mouths. It is one thing for a judge interlocutorily to say a few words respecting a judgment,—and God forbid that the House of Lords any more than any other court should be exempt from having its decisions questioned,—but it is another thing in a formal judgment for a judge below to say, I am bound by the decision above, and I submit to it, but it is compulsory ; and one of the judges is represented to have said, that if the House of Lords decided it a thousand times over he should still retain his own opinion ; but I cannot believe that any learned judge could so far forget what was due to this court, and that court, as to use such language, because it is the duty of a learned judge not to hold up the law of the land which is made by the Court of Appeal,—it is the duty of the learned judge, to obey cheerfully, and repress his objections when giving judgment, and not to say that he will retain his opinion if the court above, which is a court of competent jurisdiction, make the law by declaratory judgment ; it is the duty of the learned judge in silence to give obedience ; he may give a reluctant obedience, but he must not publish to the world that the Court above is wrong, and that he as an individual is right. It certainly requires a very great

degree of confidence; and I am bound in justice to Lord Eldon,—I am bound in justice to Lord Gifford,—and I am bound in justice to your Lordships House,—to add, that it requires a most extraordinary share of confidence,—I say no more,—of confidence in his own opinion, for any judge in the Court below to take upon him to say that Lord Eldon is wrong,—that Lord Gifford is wrong,—and that the House of Lords have been wrong, and that if they were to decide a thousand times over he should retain his own opinion. It is a degree of confidence which I do not think can be said to be a happy confidence, and I still less think that it is decorous for a learned judge, if he feels it, not to suppress it.

I am bound to make these observations, which I shall repeat as often as I ever hear it represented at that bar that such things have been said in the Court below. This House is the court of appeal; by the law of the land it has the appellate jurisdiction; it never was better advised,—it never was more diligently attended to,—the appeal business was never more learnedly or ably conducted,—than it was during the twenty-five years my venerable, noble, and most learned friend, Lord Eldon, occupied the woosack; and whenever I hear it said, by any Judge whatever, that he will not regard that most Learned Judge's decisions, even upon questions of Scotch law, I shall remind that Learned Judge that the law of the land is against it, that his oath of office is against it, that he does not do his duty if he does not yield a respectful obedience to the decisions of this high Court.

My Lords, I will add, that Lord Eldon's decisions

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**No.31.** gave infinite satisfaction to the Court below; that they gave almost uniform satisfaction. I will add, that Lord Gifford's decisions, during the two years that he sat here, were as carefully prepared,—were as diligently considered,—were as laboriously worked out, in each case, (I attended during the time as counsel at the bar,) as those of any Judge that ever sat in any court; and I will further add, that I know, from my communications with some of the most Learned Judges in Scotland, they have borne ample testimony,—and to me, in private friendship, gratifying testimony,—to the great ability and learning with which that excellent Judge delivered his judgments. My Lords, there was one exception; I have said Lord Eldon's decisions gave almost uniform satisfaction; the exception I allude to is in the Roxburgh and Queensberry cases. I argued those cases here for the purpose of showing (though there were most able and learned Scotch lawyers here,) the bounds which separated the principles of the English law and the Scotch law. We thought at the bar that Lord Redesdale was taking an English law view of a question, materially differing in the principle on which it proceeded. I endeavoured to show that it was not only unlike in its frame and constitution, but that it had gone, in process of time, in so different a direction, that, instead of being nearly unlike, the principle might be said to be opposite with respect to powers and fetters, and so on. We were dissatisfied with the judgment; it was against us. We thought Lord Eldon had yielded too much to the English law view of the case taken by Lord Redesdale. The Scotch Judges held their own opinion; but not saying they would not submit, and not professing to submit with

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reluctance,—no such thing,—but in private learnedly and respectfully discussed the subject, and sometimes admitted that they thought the House of Lords had taken a true view of the law. My Lords, I have reason to know that that opinion is changed. I have reason to know, though it took a longer time than the Duntreath and the Herbertshire cases,—I have reason to know, that in the course of some years, somewhere about ten years, they came to be exactly of the same opinion with the House of Lords; but I should say, that I could name two learned judges, who do not now acquiesce, upon re-consideration, and upon more deliberate and calm consideration, in the opinion of the House of Lords, and of Lord Eldon and Lord Redesdale; but as one of those learned judges who does not now acquiesce was counsel in the case, and argued it at the bar, he may be allowed to retain some bias in favour of his own view of the argument.

Now, justice to Lord Eldon and Lord Gifford required me to say thus much; and I do hope I never shall again have occasion, as long as I sit here, to make any such observations, for it is painful to me. My Lords, it is only bare justice to one judge, so impeached, that makes it necessary to offer an observation against any other judge. Where one is in such a situation as to appear to acquiesce on the one side, I must say, I feel the lesser of the two evils to be stating this, and protesting against it, than keeping silence. I believe, as I said before, it is more the report of the learned judge than that he really did use such expressions. I believe it is something like the report we had of another learned judge, who was reported to have said, if it

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The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed.

G. W. POOLE—DEANS and DUNLOP, Solicitors.

[15th August 1834.]\*

JAMES JOHN FRASER, W. S., Appellant.

No. 32.

Lieutenant Colonel GORDON, Respondent.

*Process.*—Held (affirming the judgment of the Court of Session) that a reclaiming note, praying to be reponed against a decree pronounced in respect of failure to lodge a revised condescence, not being marked by the clerk as lodged within twenty-one days, was incompetent.

*Appeal.*—Question, whether an appeal against a unanimous judgment refusing to repon a party against a decree in absence, without leave to appeal, be competent.

THE respondent, Colonel Gordon, raised certain actions in the Court of Session against the appellant, who had been formerly his law agent, concluding for large sums of money; on the dependence of which he executed arrestment and inhibition. These actions, and generally all claims existing between the parties, were made the subject of a submission to arbiters; one of the conditions of which was, that the appellant should assign to the respondent certain debts due to the appellant, and, in particular, certain debts alleged to be due to him by the Earl of Fife, for the constitution of which an action depended in the Court of Session. The appellant having accordingly granted an assignation, the respondent was sisted as a party to the action

2<sup>D</sup> DIVISION.  
Lord Medwyn.

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against Lord Fife, in the place of the appellant; and on the 4th of July 1833 the Lord Ordinary decerned for certain sums of money to be paid by the Earl to the respondent. In the meantime, Lord Fife having executed a trust conveyance of his estate, a multiplepointing was raised by his trustee, in which claims were lodged both by the appellant and the respondent. The Lord Ordinary, on the 6th of July and 14th of December, preferred the respondent, and granted warrant in his favour to uplift from a consigned fund a sufficient sum to satisfy his claim. The appellant reclaimed against this interlocutor; and the Court, on the 31st of January 1834, recalled it, and remitted to the Lord Ordinary to hear parties, and to do as to him should seem just. Thereafter the Lord Ordinary conjoined the action against Lord Fife with the multiplepointing, and appointed the appellant “to state in a condescence “the grounds on which he objects to Colonel Gordon, “his assignee, being sisted in these processes in his “place.” Condescence and answers were lodged and revised; and on the 4th of July 1834 the Lord Ordinary pronounced this order:—“Appoints parties “respectively to re-revise their condescence and “answers,—the re-revised condescence by the first “box-day in the ensuing vacation, and the re-revised “answers by the third sederunt day in November next.” The appellant failed to lodge his re-revised condescence; and on the 15th of November “the Lord “Ordinary, in respect the claimant has failed to obtem- “per the interlocutor of 4th July last, ranks and prefers “Colonel Gordon of new, in terms of the interlocutors “of 6th July and 14th December 1833; and of new “grants warrant for payment, in terms of said inter-

“locutors, and decerns: Finds Colonel Gordon entitled to expenses,” &c. The appellant lodged a reclaiming note, praying to be reponed, but it was not marked by the clerk. The Court having refused to write upon it, the appellant lodged a note, calling the attention of the Court to the 72d section of the act of sederunt, 11th July 1828, which he alleged was applicable, and entitled him to lodge a reclaiming note any time before extract; but the Court, on the 15th of January 1835, refused the note, “in respect that the case falls within the 57th section of the act of sederunt.”\*

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Fraser appealed.

*Appellant.*—The reclaiming note was lodged in due time, seeing that the decree passed in absence, or by default, and was not and has not been extracted. It is to a case of this nature that the 72d section of the act of sederunt applies, which provides, “that a party wishing to be reponed against a decree in absence may apply to the Inner House by a short note before extract, accompanied with the defences or other papers required, merely setting forth the interlocutor or decree, when the Court shall remit to the Lord Ordinary to repon the party on payment of such expenses as to his Lordship shall seem reasonable.” In the 57th section there is no specified period men-

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\* A few days afterwards Fraser applied to be reponed under the statute 48 G. 3. cap. 151. sec. 15., and the Court, on the 23d January, remitted to the Lord Ordinary to repon him upon payment of the previous expenses. The Lord Ordinary, on the 24th of February, decerned against him for these expenses, and allowed him, on payment of them, to give in his re-revised condescendence. He reclaimed, but the Court, on the 15th of May, adhered. He did not appeal against these interlocutors.

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tioned within which a reponing note should be lodged, the provision being merely, that it shall be lodged “ within the reclaiming days,” which may as well mean those referred to in the 72d section, as the ordinary period of twenty-one days; and if there be any ambiguity the leaning should be in favour of receiving the note.

But, independent of this plea, the reclaiming note is marked as having been boxed on the 6th of December, which was the last reclaiming day; and it is not a statutory nullity that the marking of the clerk was not affixed to it. By the 18th section of the judicature act, which supersedes the old forms of process, all that is required is, that “ the party shall, within twenty-one “ days from the date of the interlocutor, print and put “ into the boxes” a reclaiming note; and the act of sederunt does not ordain that the same shall be marked by the clerk of court.

*Respondent.*—The appeal is incompetent, because, 1st, no notice was given to the respondent of the appellant’s intention to appeal; 2d, the interlocutor of the 15th of January 1835 was pronounced unanimously, and the appellant, not having obtained leave to appeal, could not competently enter an appeal (48 Geo. III. cap. 151. sec. 14); and, 3d, the interlocutor pronounced by the Lord Ordinary on the 15th of November 1834 was not reviewed by the Inner House, and therefore could not competently be appealed against. The appellant did not allege that the Lord Ordinary did wrong in discerning against him in respect of failure to lodge his paper; but on the contrary, conceding that he had done right, he applied to the Court to be reponed, so that the Inner House

were not called on to review the interlocutor of the Lord Ordinary.

But on the merits the interlocutors are well founded. The 72d section of the statute is applicable to proper decrees in absence, where there has been no appearance at all; whereas, the 57th section applies to the case where the party has appeared, but has allowed decree to pass against him by failure to obey an order. In that latter case, the note must be lodged "within the "reclaiming days," which clearly means twenty-one days from the date of the interlocutor, being the statutory reclaiming days\*; but the note was not duly lodged, and was confessedly not marked by the clerk within the twenty-one days. According to the established practice of the Court of Session, the marking of the clerk is the only authentic evidence that a paper has been duly lodged.†

The House of Lords ordered and adjudged, That the said petition and appeal be and the same is hereby dismissed this House, and that the interlocutors therein complained of be and the same are hereby affirmed: And it is further ordered, That the appellant do pay or cause to be paid to the said respondent the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant.

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\* *Lumsdaine v. Australian Company*, 18th Dec. 1834, 13 S. & D., 215.

† *Learmonth v. Baird*, 1st June 1826, 4 S. & D., 654 (new ed. 660); *Stewart v. Lang*, 16th Nov. 1826, 5 S. & D., 2; *Workman v. Smith*, 12th May 1832, 10 S. & D., 525.

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No. 33. WILLIAM DRUMMOND, for the Fife Banking Company,  
Appellant.

CHARLES HUNTER and others, Trustees of the late  
ANDREW THOMSON, Respondents.

*Partnership — Sale — Homologation.*—Circumstances under which it was held (affirming the judgment of the Court of Session), 1, That the share of a partner in a joint stock company had been transferred to an assignee, although the deed of assignation was not produced; and, 2, That the company by their conduct had waived a stipulation in the contract that all transfers should be made in a particular form and manner.

*Proof.*—Question, Whether it be competent to found on the scroll of a deed, as secondary evidence of its contents, without first proving the execution of the deed.

1ST DIVISION.  
Ld. Corehouse. **T**HE appellant, as cashier of the Fife Banking Company, which commenced business on the 2d of August 1823, brought an action before the Court of Session against the respondents, as representing the late Andrew Thomson of Kinloch, and against several other parties, setting forth, that in the month of May 1802 certain persons entered into a contract, by which they agreed to carry on a joint trade and business of banking, under the firm of the Fife Banking Company, for twenty-one years; that the capital stock was fixed at 30,000*l.*, divided into shares of 500*l.* each; and that the contract

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\* The correct date is 31st August 1835.

should endure for twenty-one years from and after the 2d of August 1802: That the late Andrew Thomson of Kinloch held one share, and subscribed the contract, and that the business was carried on for the stipulated period: That, a few months previous to the expiration of the contract, a proposition was made, and agreed to by all the partners, (with the exception of seven, of whom Mr. Thomson was not one,) that an extension of the old contract, or rather that a new contract, should be made, to endure for five years from the 2d of August 1823, when the original contract expired: That accordingly the new company proceeded to carry on business under the management of directors, while certain managers were appointed to wind up the affairs of the old concern: That these managers “ from time to time “ paid over to the officers of the new company, to be “ placed by them to the credit of the old company, “ such of the assets thereof as they recovered; that, “ on the other hand, the new company, with the appro- “ bation and by the authority of the old company, “ retired the notes and other obligations of the first “ company, when the same were from time to time “ demanded:” That the new company brought their business to a termination in December 1825; and “ that, agreeably to account current, commencing said “ 2d August 1823 and ending 2d August 1831, be- “ twixt the first and second Fife Banking Companies, “ the first company was, at the last of these dates, “ addebted and resting owing to the second company “ the sum of 143,000*l*.;” and he therefore concluded against the first bank, and the partners thereof (including the respondents), for payment of the above sum.

The respondents admitted that Mr. Thomson was originally a partner of the company, but alleged that he

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had transferred his share, in the year 1822, to Mr. Ebenezer Anderson, the cashier and manager of the bank, who was received by the company, and admitted into Mr. Thomson's place.

It appeared that Mr. Thomson had been cautioner to the bank for a Mr. Gourlay, who became bankrupt in 1820, and that, on the 11th of October of that year, his agent wrote to Mr. Anderson in these terms:—" Mr. Thomson of Kinloch wishes to sell " his Fife Bank shares, on purpose to pay his obligation to the bank for Mr. Gourlay. Will you get " a merchant for them, or shall I advertise them in the " newspapers?" And in a subsequent letter he wrote, begging to " know whether it is necessary by the contract to make an offer of the stock to the directors " before it is advertised for sale; and if so, what was " the last selling price, as Mr. Thomson is willing " that the directors shall have it at that rate?" The stock was afterwards advertised for sale, and was purchased by Mr. Anderson in 1822, at the price of 200*l.* The respondents alleged that a formal deed of assignation was granted in his favour, of which they produced the scroll; but stated that Mr. Anderson had fled from Britain; and as the deed had been delivered to him, they could not make it forthcoming. This sum, it was stated, had not been paid to Thomson, but was placed to his credit in the bank books, in extinction pro tanto of the debt due by him to the bank. By this assignation, Anderson acquired right to the dividends from August 1821.

Besides Mr. Thomson's share, Anderson held another, acquired from a Mr. Reid, and the dividends were 12*l.* 10*s.* per share. The first dividend was payable on the 7th of October 1822; and of that date an entry

appeared in the books of the bank in these terms:—  
 “ 1822, October 7.—P<sup>d</sup>. Eb. Anderson for 2 - £25;”  
 and there stood a marking on the margin opposite to  
 to the entry in the following words:—“ William Reid,  
 “ Andrew Thomson;” which, it was said, denoted  
 that the shares had formerly belonged to these parties;  
 but the appellant alleged that this marking had been  
 made *ex post facto*. Again, on the 4th of October  
 1823, being the last year of the old concern, there was  
 the following entry:—“ 1823, October 4.—E. Ander-  
 “ son, 2 - £25.” These entries it was alleged meant  
 to represent that Anderson was proprietor of the two  
 shares. He had not been an original shareholder;  
 and it was not alleged by the appellant that these  
 dividends had been paid in respect of any other  
 shares than those of Thomson and Reid. It also  
 appeared, that posterior to the date of the assignation,  
 and until the termination of the first contract, Thomson  
 was not called to attend any meetings. His name was  
 introduced into the new contract as one of the partners  
 who had agreed to renew it, but it was not subscribed  
 by him. It consisted of five pages, and was signed on  
 each of these pages by Anderson; and on the fifth page,  
 (but not on the others,) there appeared at the end of all  
 the other signatures one in these terms:—“ Eb. Ander-  
 “ son, assignee of Andrew Thomson.”

On the other hand, the appellant stated, “ that it  
 “ was provided, that if any partner inclines to sell or  
 “ transfer his share, he shall give notice of the intended  
 “ sale, and the person to whom he proposes to sell,  
 “ thirty days at least prior to a general meeting, of  
 “ which notice the cashier shall immediately advise the  
 “ whole partners by circular letters; and, at the following

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“ general meeting, the intending purchaser must be  
 “ approved of by a majority of the meeting properly  
 “ authorized to vote, otherwise no sale can take place.”

It was also provided, that the shares should be accepted of by the purchaser “ in presence of the directors, who shall also sign the deed of acceptance, after being “ authorized by the company;” and it was alleged that this rule had not been complied with; that the other partners were not made aware of the transfer, and had never consented to it; that the entries in the books were not such as to inform the company that the right had been acquired by Anderson; and it was not admitted that the deed of assignation ever existed. The appellant therefore pleaded,—1. That as the transfer had not been executed according to the terms of the contract, it was not available in a question with the company; 2, That there was no legal evidence of the transfer; and, 3, That at all events the respondents were liable for all debts prior to the date of the transfer.

The Lord Ordinary, on the 21st of January 1834, pronounced this interlocutor:—“ Finds it proved, by “ the documents produced or referred to, that the late “ Andrew Thomson sold his share as a partner of the “ first banking company, in the year 1822, to Eben- “ ezer Anderson, the accountant and teller of that “ bank, for the sum of 200*l.*, and that the share was “ conveyed to him accordingly by a deed of assignation “ granted by the seller; that the transfer of the share “ was not executed in the form and according to the “ rules prescribed by the contract of copartnery, but “ that it was recognised, homologated, and acted upon “ by the company, and in consequence became effectual “ in a question with them, as well as in a question

“ between the seller and purchaser; therefore, that the  
 “ late Andrew Thomson was not a partner of the com-  
 “ pany at the expiry of the contract in 1823; assoilzies  
 “ the defender, Charles Hunter, as trustee for Thom-  
 “ son’s representatives, from the conclusions of this  
 “ action, and decerns, and finds him entitled to ex-  
 “ penses; reserving action to the pursuer, in competent  
 “ form, for any sum for which Thomson’s representa-  
 “ tives may be liable in consequence of Thomson being  
 “ a partner of the company previous to the transfer of  
 “ his share in 1822.”

His Lordship at the same time issued this note:—  
 “ Though the contract of copartnery prescribes certain  
 “ forms, according to which shares shall be transferred,  
 “ the company might dispense with these forms, if they  
 “ thought fit.” (East Lothian Bank v. Turnbull, 3d June  
 1824; Turnbull v. Allan and Scott, 1st March 1833.)\*

“ In the present case, it is proved that Thomson  
 “ sold his share to Anderson, and executed a deed of  
 “ assignation in his favour. The original deed is not  
 “ produced, Anderson having absconded; but sufficient  
 “ adminicles are produced to prove its tenor, which it  
 “ is not necessary to do in a substantive action to that  
 “ effect, the deed being founded upon in defence only,  
 “ and for various other reasons. (Moderator of the Synod  
 of Merse and Tiviotdale v. Scott, 21st Nov. 1753.) †

“ That the transfer was recognised and acted upon  
 “ by the company, is proved by their giving Thomson  
 “ credit in account for 200*l.*, being the price of the  
 “ share, and applying that share in extinction of a debt  
 “ due by him to the company,—by payment of divi-

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\* 3 S. &amp; D. 95., and 11 S. &amp; D., 487.

† Mor. 15823.

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“ dends on that share to Anderson, as holder of it, on  
 “ various occasions, from the date of the transfer to the  
 “ expiry of the contract,—by entries in the company’s  
 “ books to all these effects, ignorance of which the  
 “ partners are not entitled to plead,—by Anderson’s  
 “ admission into the second company as the holder of  
 “ the share,—by his being permitted to sign the second  
 “ contract in that character, and to receive dividends  
 “ upon it from the second company, — and various  
 “ other circumstances mentioned in the pleadings;  
 “ Holding it clear that Thomson ceased to be a partner  
 “ of the first company at the date of the transfer, it  
 “ follows that the present action cannot be maintained  
 “ against his representatives, as liable for any debts  
 “ contracted by the company subsequently.

“ It has been argued, however, that the defender is  
 “ liable for sums applied towards the extinction of  
 “ debts contracted by the company before Thomson  
 “ ceased to be a partner, and that both at common  
 “ law, and by the provision in the 13th article of the  
 “ contract; but the Lord Ordinary thinks that that  
 “ question cannot be competently raised under the  
 “ record which has been closed in this action. The  
 “ sum concluded for against the defender, rateably  
 “ with the other partners and their representatives, is  
 “ ‘ 143,005*l.* 0*s.* 10½*d.*, with interest, agreeably to an  
 “ ‘ account current, commencing the 2d of August 1823,  
 “ ‘ and ending 2d August 1831,’ both periods being sub-  
 “ sequent to Thomson’s retirement; and it is not set  
 “ forth in the summons, that any part of that sum was  
 “ applied in paying debts or satisfying obligations ex-  
 “ isting prior to 1823. Farther, it is set forth in the  
 “ 22d article of the pursuer’s condescendence, as the

“ sole medium concludendi, ‘ that the defenders are  
 “ ‘ either, 1st, original partners of the first company,  
 “ ‘ who remained so at the expiry of its contract, or  
 “ ‘ the representatives or trustees of such partners; or,  
 “ ‘ 2d, purchasers or assignees of the shares of original  
 “ ‘ partners, who thus held shares and were partners  
 “ ‘ at the expiry of the contract; or the representatives  
 “ ‘ or trustees of such purchasers or assignees, and are  
 “ ‘ the whole parties jointly and severally liable for the  
 “ ‘ debt sued for in this action.’ Lastly, there is no  
 “ averment in the pursuer’s condescendence, nor plea  
 “ in law annexed to it, applicable to this separate  
 “ ground of liability. If it was to be insisted in, the  
 “ pursuer, in fairness to Thomson’s representative,  
 “ ought to have brought it out distinctly on the record,  
 “ that a defence might have been stated against it,  
 “ which has not been done. But as it may perhaps be  
 “ competently tried in another shape, action has been  
 “ reserved.”

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The appellant having reclaimed to the Court, their Lordships, on the 22d of May 1834, adhered.\*

Drummond appealed, and attempted to establish that the facts on which the interlocutors were founded were either inaccurate, or not supported by proper evidence; and that, at all events, the facts were not such as to convey to them such knowledge as was necessary to give relevancy to the plea of homologation, in order to elide the stipulation in the contract as to the mode of transfer.

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\* 12 S. & D., 620.



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The respondents, on the other hand, contended that the facts were proved by competent and satisfactory evidence, and that the circumstance of having paid the dividends to Anderson was conclusive evidence of the recognition of him as the assignee of Thomson.

LORD BROUGHAM.—My Lords, the inclination of my mind is, that the question rests entirely upon the validity of the deed of assignation; that it need not be proved by an action of proving the tenor, as it was set up by way of exception, and not by way of the foundation of the original suit. I agree that an action of proving the tenor is not necessary where a deed is only founded upon, as in this case, and where without any such deed the same matter might be shown otherwise; yet where there is the necessity of showing, in the first instance, the existence of the deed as the very fundamental principle upon which the party can alone proceed, the admission of secondary evidence is not competent. Now, I cannot see how the Lord Ordinary could, without the circumstance being established that the deed was ever executed, or was destroyed, found his judgment upon evidence which he considered sufficient to prove what the contents of that deed were. Be it so, that secondary evidence could be let in of its contents, as is here contended for, still it cannot be legally done here, unless it be proved in the first instance that the deed ever existed.

With that exception, I must say I have no great ground to quarrel with the judgment of Lord Corehouse. His Lordship's interlocutor is by no means an interlocutor drawn per incuriam. It is, on the con-

trary, a very laboriously constructed interlocutor. I thought so yesterday, and I am more of that opinion now. I am satisfied of that upon a very attentive view of the whole circumstances of the case. There may be some points upon which one cannot go along with it, but it is not so upon others; and therefore, although upon the whole matter I should be inclined to say I at present see nothing exceptionable, yet, as it is entirely a matter of fact, I should request of your Lordships that there should be some further delay, to look into it.

His Lordship afterwards moved, and —

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

ANDREW M'CRAE—RICHARDSON and CONNELL,  
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No. 34. The Reverend JOHN MARTIN and others, Appellants.

CHARLES HUNTER and others, Trustees of ANDREW THOMSON, Respondents.

*Partnership—Process.*—Circumstances in which it was held (affirming the judgment of the Court of Session) that the pursuers of an action of relief inter socios of debts, for which a separate action had been brought against the company, were not entitled to insist in the action of relief to a greater extent than the conclusions in the principal action.

1ST DIVISION.  
Ld. Corehouse.

ON the action noticed in the preceding report being instituted, the appellants, who were called as defenders in it, and who stated that they had either paid or were willing to pay their shares of the debt sued for, raised an action against those of the partners who refused to do so, reciting the terms of the summons, and concluding against the respondents, and each of the other parties, to relieve the appellants of such part of the debt of 143,000*l.* as corresponded to their respective shares.

The Lord Ordinary assoilzied the respondents “from “ the conclusions of the action in hoc statu, and de-

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\* The correct date is 31st August 1835.

“ cerned, reserving to the pursuers their claim of  
 “ relief, in the event of the second Fife Banking Com-  
 “ pany being able to establish a debt against the pur-  
 “ suers and defenders for the sums applied by the  
 “ second Banking Company in extinction of debts  
 “ contracted by the first Fife Banking Company pre-  
 “ vious to the late Andrew Thomson’s retirement from  
 “ the first company, and to the defenders their defences  
 “ against that claim as accords.”

The appellant reclaimed to the Inner House ; but their Lordships, on the 22d of May 1834, adhered.

Martin and others appealed, and maintained that although the conclusions in the original action were confined to a period posterior to the 2d of August 1823, yet, as the object of their action was to get relief proportionally from the respondents of the debts due by the first company, and there was no such limitation in their conclusions, they were entitled to be heard as to the liability of the respondents for the debts prior to the date of the alleged transfer, even if it should be found that such a transfer had been duly executed.

The respondents answered, that the action of the appellants was founded entirely on, and had for its object to obtain relief from the other action, and that accordingly their conclusions were for payment of a share of the debt of 143,000*l.*, being the debt which was said to be exhibited by the account current, commencing in August 1823 and ending in August 1831, founded on in the original action.

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No. 34.      The House of Lords ordered and adjudged, That the  
15th August      said petition and appeal be and is hereby dismissed this  
1834.      House, and that the interlocutor, so far as therein com-  
                                 plained of, be and the same is hereby affirmed.

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GENERAL  
INDEX OF MATTERS

CONTAINED IN  
THE SEVEN VOLUMES.

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NOTE — The Roman Capitals refer to the Volumes, the Figures to the Pages.

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ABSOLUTE OR CONDITIONAL. See *Condition*, 2.

ABSOLUTE OR REVOCABLE. See *Revocation*, 2.

ACQUIESCENCE.

1. A landlord let a mill described as a paper mill, and it was made use of, with his knowledge, for six years as an oil mill; and thereafter the tenant assigned the lease to another party, who employed it as a flour mill;—Held (affirming the judgment of the Court of Session) that the landlord was barred from insisting that it should not be used as a flour mill, but should be reconverted into a paper mill. *Young and others v. Ramsay*, June 21, 1825, - - - - I. 560.
2. Circumstances held not to constitute an acquiescence barring an heir of entail from challenging a lease in a question with an onerous assignee. *Stirling v. Dunn*, June 22, 1829, III. 462.
3. Circumstances under which (affirming the judgment of the Court of Session) a claim for repetition of money alleged to have been paid in ignorance held to be barred by acquiescence. *Dixons v. Monkland Canal Company*, Sept. 17, 1831, - V. 445.  
See *Entail*, 9.—*Sale*, 6.

ADJUDICATION.

A party sold land, with warrandice against augmentation of stipend, and with part of the price bought two estates, which he took, under fetters of entail, in favour of himself and spouse in life-rent, and his son in fee, and a series of substitutes; and he granted an heritable bond of warrandice over one of the estates, which was adjudged for relief of augmentations:—Held (affirming the judgment of the Court of Session) that an heir who had made up titles to the fiar could not prevent the other estate from being also adjudged for relief of the augmentations. *Justice v. Callander*, April 6, 1830, - - - IV. 94.  
See *Agent and Client*, 4.—*Entail*, 19.—*Husband and Wife*, 7.

## GENERAL INDEX OF MATTERS

ADMINISTRATION OF JUSTICE. See *College of Justice*.—*Expenses*, 2.  
—*Process*, 2. 19.—*Public Officer*.

ADVERTISEMENT. See *Lease*, 2.

ADVOCATION. See *Lease*, 8.—*Process*, 2.

### AGENT AND CLIENT.

1. Circumstances under which it was held (affirming the judgment of the Court of Session) that an agent in a sequestration was not entitled, after the bankrupts had been discharged on payment of a composition, and finding security for payment of expenses, to claim the amount of his account from the creditors. *Guthrie v. Curl and others*, May 13, 1825, - - I. 191.
2. Held *ex parte* (affirming the judgment of the Court of Session), in an action at the instance of a law agent for payment of his account, that a mandate alleged, but denied, to be signed by the client's mark, together with other circumstances inferring employment, was sufficient to entitle him to decree against the client. *M'Lean or Bryan v. Murdoch*, May 28, 1827, - II. 568.
3. Circumstances in which an agent who was employed by the lender of a sum of money, to be secured over an heritable subject, and also by the borrowers, to prepare the necessary deeds, but without any special instructions as to the form of the security, having constituted a real security, but neglected to insert a personal obligation on the borrowers or a power of sale in favour of the lender, was held (affirming the judgment of the Court of Session) liable for the loss sustained by the lender from the want of these clauses. *Clark v. Sim*, July 1, 1833, - - VI. 452.
4. A law agent, who was employed by a creditor to lead an adjudication against the entailed estate of his debtor, raised a summons concluding for decree of adjudication of the debtor's life-rent interest in the lands, which he obtained; and he employed another agent to complete a feudal title on the decree by charter and sasine, which was done accordingly; but it was afterwards found that they were inept as a feudal title, in respect the fee and not the life-rent ought to have been adjudged:—Held (affirming the judgment of the Court of Session) that the original agent was liable in repetition to the creditor of the expense of the charter and sasine, but not in damages; and that the other agent was not liable in repetition or damages. *Graham v. Alison and others*, July 19, 1833, - - VI. 518.  
See *Partnership*, 12.—*Process*, 30.—*Reparation*, 2. 5.

### AGENT AND PRINCIPAL.

1. Held that a company having employed agents to freight vessels, who accordingly did so in their own name, and the company having failed to implement the charterparty, was liable to relieve these parties from damages awarded against them for non-implementation. *M'Braire v. Hamiltons*, March 22, 1826, - II. 66.
2. Held (affirming the judgment of the Court of Session) that a mandatory or factor of a person abroad is entitled to act

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### AGENT AND PRINCIPAL—*continued.*

- in that character until he receive authentic intelligence of the death of his constituent. *Campbell v. Anderson*, May 1, 1829, - - - - - III. 384.
3. Circumstances under which it was held (affirming the judgment of the Court of Session) that a party receiving money as attorney of another was bound to lay it out at interest within six months thereafter, and was liable in 5 per cent. for all money not so laid out; and that he was entitled to a commission of  $2\frac{1}{2}$  per cent. on the money received by him. *Brown v. Brown*, March 3, 1830, - - - - - IV. 28.

AGREEMENT. See *Clause*, 4.

### ALIMENT.

1. A nobleman left his estates to his eldest son, and a provision of 12,000*l.* to his second son; the eldest made an entail, excluding his brother from the estates, but calling his son as institute, and conveyed the estates to trustees, to be held for a number of years, so as to exclude his brother's son from the enjoyment of them during that period. On his death his brother's son made up titles under the entail, subject to the burden of the trust; and the trustees were infeft; and he had an income by his wife of 500*l.* per annum;—Held (affirming the judgment of the Court of Session) that he had no claim against the trustees for aliment, either under the Act 1491, or as representing his grandfather, or on any other ground. *Lord Glamis v. Earl of Strathmore's Trustees*, May 6, 1825, - - - - - I. 183.
2. The Court of Session found that a son who had a commission in the army as an ensign, with 90*l.* of pay, and an allowance of 100*l.* a year from his father (who was an heir of entail in possession of an estate yielding an income of 10,000*l.*), was entitled to an aliment of 800*l.* per annum from his father;—But the House of Lords reversed the judgment, and assoilzied the father. *Maule v. Maule*, June 1, 1825, - - - - - I. 266.
3. Held (affirming the judgment of the Court of Session), 1. That the younger brother of an earl who had attained majority—had received a provision from his father of 12,500*l.*, and had succeeded to the honors, but was excluded from the estates by a trust deed executed by his brother in favour of trustees, had no claim of aliment against these trustees, although he was destitute, and the estates had originally belonged to his father. 2. That he was not entitled to payment of the expenses of process out of the trust estates. *Earl of Strathmore v. Earl of Strathmore's Trustees*, June 17, 1825, - - - - - I. 402.

See *Husband and Wife*, 1. 4.

APPEAL. See *Process*.

### APPROBATE AND REPROBATE.

A domiciled Scotsman executed in Scotland a deed of settlement conveying to trustees his whole property, including an English estate, which was probative according to the law of



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### APPROBATE AND REPROBATE—*continued.*

Scotland, but defective in point of form as to the conveyance of the English estate:—Found (affirming the judgment of the Court of Session) that the heir to the English estate could not take it, and at the same time claim a provision made to him in the trust-deed. *Dundas v. Dundas, &c.*, Dec. 22, 1830, - IV. 460.

See *Foreign*, 2.

### ARBITRATION.

1. Circumstances under which (affirming the judgment of the Court of Session) a decree-arbitral alleged to be ultra vires, and to contain an error calculi, was sustained. *Turnbull's Trustees v. Robertson*, April 26, 1825, - - - I. 143.
2. A landlord having obtained and extracted a decree of irritancy of his tenant's lease, in which there was no stipulation as to meliorations; and thereafter entered into a submission with him of "all claims, questions, disputes, and differences of every kind depending and subsisting betwixt them, upon any account, transaction, or occasion whatever, preceding the date hereof;" and the arbiter having found the tenant entitled to a sum for meliorations:—Held (affirming the judgment of the Court of Session) that he had not exceeded his powers. *Pitcairn v. Drummond*, May 20, 1825, - - - I. 194.
3. A submission having been made to three arbiters, and in case of their differing in opinion to any two of them, of all claims which the parties submitting had against each other for the proportions of profit and loss which they ought to have borne for a particular year, arising out of the transactions of a company of which they were partners, and with power to the arbiters to ascertain whether there had been any error in the books of the company; and a decree having been pronounced by two of them (without previously issuing notes) on the narrative that the other had differed in opinion; and having, without investigating the books, found one of the parties liable in a certain sum, as the loss corresponding to a certain share:—Held (affirming the judgment of the Court of Session), 1, that the decree was valid, although signed by the two arbiters only, and although there was no evidence under the hand of the third arbiter that he had differed; 2, that the questions submitted were exhausted; and, 3, that the failure to issue notes was no objection to the decree. *M'Callum v. Robertson*, May 23, 1826, - - - II. 344.
4. Held (affirming the judgment of the Court of Session), 1, that a reference or submission by a landlord and tenant during the currency of a lease, and on the eve of a break, to a third party, as to a deduction of rent, was constituted by a series of letters; that it related to the period of the tenant's possession posterior to the break, and not to the prior years; and therefore, that the decree which was confined to the posterior years was good; and, 2, observed, that even although the reference had embraced both periods, yet, as the tenant was the sole claimant, and decree was given on part of his claim, it was no objection that

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### ARBITRATION—*continued.*

judgment was not pronounced on the other part; but the case would have been different if there had been claims on both sides, and judgment given only as to one of the claims. *Maclellan v. Macleod*, July 9, 1830, - - - - - IV. 157.

5. Held (affirming the judgment of the Court of Session) that although interim decreets arbitral had been subscribed, given to the clerk, and copies sent to the parties, yet, as the submission was terminated without any final judgment, and the decrees had never been delivered or recorded, they were null. *Gray and Woodrop v. M'Nair*, July 8, 1831, - - - - - V. 305.

ARRESTMENT. See *Inhibition*, 2.

### ARRESTMENT IN MEDITATIONE FUGÆ.

A married woman was brought from England to Scotland on a criminal warrant, and tried for the crimes of housebreaking and robbery, of which she was acquitted:—Held, 1, that she was liable to be immediately arrested on a meditatione fugæ warrant at the instance of the parties whose property had been stolen; 2, that it was competent to obtain a second warrant, after the first had been dismissed as irregular in form; 3, that it is sufficient ground for granting a warrant to apprehend as in meditatione fugæ, if the creditor depones to the verity of the debt, and his belief that the debtor meditates flight. *Crowder v. Watsons*, August 16, 1832, - - - - - VI. 271.

ARRESTMENT JURISD. FUND. CAUSA. See *Foreign*, 1.

### ASSIGNATION.

1. Circumstances under which it was held, *ex parte*, (reversing the judgment of the Court of Session,) that an assignation of a building lease by a father to his sons was not collusive; and therefore sustained in a question with a creditor of the father. *Malcolms v. Young*, June 5, 1829, - - - - - III. 404.
2. Circumstances in which held (affirming the judgment of the Court of Session) that an assignation of the share of company stock, consisting of leases, had been effectually transferred. *Russell v. E. of Breadalbane*, April 4, 1831, - - - - - V. 256.  
See *Bankruptcy*, 12.—*Foreign*, 6.—*Partnership*, 13, 15.

ASSIGNATION IN SECURITY. See *Right in Security*.

### BANK.

A person cut in two the notes of the Bank of Scotland for more safe transmission (as he alleged), and one set of the halves was stolen; the Court of Session having found that the bank was not bound to pay on production of the other set of halves, although the value of the stamp and charges for issuing new notes were offered, and security against any demand being made for the lost halves, the House of Lords reversed the judgment, and remitted to allow a proof of an averment, that the notes had been cut maliciously and designedly to injure the bank. *Maberly and Co. v. Bank of Scotland*, March 1, 1825, - - - - - I. 10.

See *Obligation*, 5.

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### BANKRUPTCY.

1. Held *ex parte* (reversing the judgment of the Court of Session) that cautioners and assignees under a composition contract were preferable to creditors acceding to that contract on a fund belonging to the bankrupts in the hands of a party who, for their accommodation, had drawn bills on the competing creditors, by whom they had been accepted. *Orr, &c. v. Hance, &c.*, May 27, 1825, - - - - - I. 227.
2. A trustee on a sequestrated estate under the 33 Geo. III. c. 74. inserted a claim in a scheme of division, but allotted no dividend; and marked that the claimant "held goods;" and no complaint having in due time been made by the claimant, the trustee paid away all the funds:—Held (reversing the judgment of the Court of Session) that the trustee was not liable for the dividends. *Jamieson's Trustee v. Ure and Miller*, June 21, 1825, I. 565.
3. Held (affirming the judgment of the Court of Session), in a petition and complaint by creditors against a trustee on a sequestrated estate, praying for his removal, that although he had committed some irregularities, yet they were not such as to warrant his removal; and as the other accusations against him were not well founded, he was entitled to his expenses, subject to modification. *Ewing, Buchanan, & Co., and Malcolm, v. Lawrie*, Feb. 28, 1826, II. 19.
4. Judgment, discharging a bankrupt under the act 54 Geo. III. c. 137., and repelling various objections to the discharge being granted. *Ewing v. Gilchrist*, Feb. 28, 1826, - II. 22.
5. Held (affirming the judgment of the Court of Session), 1, that an affidavit emitted in relation to a claim on a sequestrated estate by a bankrupt under sequestration, and not by his trustee, is irregular; and, 2, that after a claim has been rejected, and no complaint made in due time, the party claiming has no right to object to a composition agreed to by the other creditors, but is only entitled to a composition in the event of establishing that a debt is due to him. *Ferrier and White v. Berry and Trustee*, April 25, 1826, - - - - - II. 93.
6. A jury having found that, within sixty days of an admitted bankruptcy, the indorsee of a bill accepted by a bankrupt did not enter into an agreement or concert with the bankrupt for the purpose of obtaining security and payment of the bill; but that the indorsee, by means of the sale of the bankrupt's heritage, did within the sixty days obtain from him a sum of money as provision for payment of the bill when it became due; and the Court of Session having held this transaction not to be reducible under the act 1696, the House of Lords remitted this latter point for reconsideration. *Dunlop's Trustee v. Dunlop*, May 22, 1826, II. 253.
7. A party drew two bills on another, and discounted them with a bank; and the bills were dishonoured by non-acceptance; the drawer within sixty days of his bankruptcy drew a bill on his son for the amount of the dishonoured bills, which he accepted on receiving an heritable security in relief; and this bill was indorsed to the bank by the drawer, whose estate was sequestrated:—Held (affirming the judgment of the Court of Session)

IN THE SEVEN VOLUMES.

**BANKRUPTCY—continued.**

- that the indorsation to the bank was reducible under the act 1696, c. 5., but reversing the judgment so far as it imported that the bill was to be delivered up by the bank to the trustee for the creditors of the bankrupt. *Low v. Bell*, June 12, 1827, II. 579.
8. Held (affirming the judgment of the Court of Session) that a general adjudication under the bankrupt statute of the estates of an heir in favour of the trustee on his sequestrated estate, within three years from the death of the ancestor, constitutes complete diligence in favour of the creditors of the ancestor, so as to give them a preference over his estates, without the necessity of leading separate adjudications. *Bennet v. M'Lachlan*, June 15, 1829, - - - - - III. 449.
9. A petition for approval of composition by a bankrupt having been refused by the Court of Session, and the opposition by the creditors who appeared in that Court having been withdrawn,—The House of Lords reversed, but remitted to allow a scrutiny if required by any opposing creditor. *Brown v. Ewing and others*, April 8, 1830, - - - - - IV. 122.
10. Circumstances in which (affirming the judgment of the Court of Session) objections stated to a petition for sequestration under the bankrupt statute were repelled. *Scot v. Leith Bank*, Dec. 9, 1830, - - - - - IV. 441.
11. Circumstances in which (affirming the judgment of the Court of Session) objections to an offer of composition were repelled. *Robertsons v. Alexander, &c.*, Feb. 4, 1831, - - - V. 1.
12. Held (affirming the judgment of the Court of Session), 1, that it is competent for a creditor to apply for sequestration whose debt is of the statutory amount, but consists partly of a sum originally due to himself, and partly of a debt purchased by him at an under value, subsequent to the bankruptcy: 2, that the assignation of such a debt requires to be written on a deed stamp, and not on an ad valorem stamp: 3, that as no objection was taken to the assignation, in respect of its being written on a wrong stamp, until after sequestration was awarded, and as there was no room to suppose that the Court was aware of the objection, and as the defect was afterwards supplied, the sequestration was valid. *Robb v. Forrest*, Oct. 3, 1831, - - - V. 740.
13. The Court of Session having held that a party who had been for a short while a trader, but had totally wound up business, and, as he alleged, paid all the debts and obligations incurred while a trader, was liable to be sequestrated at the instance of a creditor, whose debt was a private debt, incurred many years before the debtor had commenced trade, but which had continued unpaid during and after his trading; the House of Lords directed the following question to be put to the Twelve Judges:  
 “ A., not a trader, becomes indebted to B. to the amount of  
 “ 100*l.* A. afterwards becomes a trader, and ceases to be a  
 “ trader, never having paid his debt to B. After ceasing to be  
 “ a trader, he commits an act of bankruptcy. Can B. support a  
 “ commission against him upon his debt and that act of bank-

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### BANKRUPTCY—*continued.*

- “ruptcy?” The judges declared their unanimous opinion in the affirmative. *Baillie v. Grant*, June 25, 1832, - VI. 40.
14. Can a sequestration issue at the instance of some of the partners of a bank against one of their partners, on a debt due by him individually to the company? *Scot v. Ker and another*, August 11, 1832, - - - VI. 214.
15. Held (affirming the judgment of the Court of Session) that a party who had been charged with letters of horning, and who retired to Holyrood-house before caption could be executed against him, but who was apprehended in the sanctuary, and there and then pleaded his protection, was a notour bankrupt within the meaning of the statute. *Baillie v. Grant*, June 25, 1832, - - - VI. 40.
16. Held (affirming the judgment of the Court of Session) that a disposition and assignation, and infeftment taken thereon within sixty days of the bankruptcy of the granter, in implement of missives of sale executed several months previously, were not reducible under the act 1696. *Cranstoun and others v. Bontine and another*, July 6, 1832, - - - VI. 79.
17. Circumstances under which (reversing the judgment of the Court of Session) a bankrupt whose estate was under sequestration was held not bound to find caution for expenses of process as a condition of being allowed to defend himself against a declarator of irritancy of a lease. *Taylor v. Fairlie's Trustees*, March 1, 1833, - - - VI. 301.
18. A party who held a lease and feus became bankrupt, and the trustee on his sequestrated estate entered into possession of the lease, and was infeft in the feus; and for several years took the benefit of the lease and feu-rights for the use of the sequestrated estate:—Held (affirming the decision of the Court of Session) that he was bound to fulfil the prestations due under these contracts towards the landlord. *Gibson v. Kirkland and Sharpe*, March 25, 1833, - - - VI. 340.
19. A party who acceded to a composition contract on condition that all the creditors to a certain amount should also accede within a limited time, Held (affirming the judgment of the Court of Session) not bound, the conditions not being complied with; and issue sent to be tried by a jury, whether certain payments and indorsations of bills by a debtor, within sixty days of his bankruptcy, to a banker, were made in the ordinary course of trade. *Blinchow's Trustee v. Allan and Co.*, August 28, 1833, - - - VII. 26.
20. Held (affirming the judgment of the Court of Session) that in a competition for the office of trustee on a sequestrated estate, it is not a relevant objection to allege that a claim is suspicious, and that the claimant has an interest adverse to the other creditors, and may have the sole command of the estate and control of the trustee. *Paul v. Gibson*, June 14, 1834, - VII. 462.
21. A claimant, who was so situated as to be unable to make any other oath than that a sum was due to him, according to the best

IN THE SEVEN VOLUMES.

**BANKRUPTCY—continued.**

of his knowledge and belief, but without prejudice to augment or restrict the sum afterwards:—Held (affirming the judgment of the Court of Session) entitled to vote for a trustee. *Paul v. Gibson*, June 14, 1834, - - - VII. 462.

22. Where a party made affidavit to a precise sum as being due, and was so situated as not to require, *hoc statu*, to produce a voucher:—Held (affirming the judgment of the Court of Session that his founding on a deed in support of his claim, did not vitiate his vote, although the deed did not support the claim made, but was at variance with it. *Paul v. Gibson*, June 14, 1834, - - - VII. 462.

23. A party, in emitting an affidavit, having deponed that he could not write, and the oath being signed by the magistrate:—Held affirming the judgment of the Court of Session) that there was no need of a signature by notaries for the party. *Paul v. Gibson*, June 14, 1834, - - - VII. 462.

See *Agent and Client*, 1.—*Assignment*, 1.—*Cessio Bonorum*.—*Competition*.—*Foreign*, 4.—*Jurisdiction*, 1.—*Right in Security*.—*Writ*, 4.

**BILL OF EXCEPTIONS.** See *Process*, 8.

**BILL OF EXCHANGE.**

1. Circumstances under which, in a question with the payees of a promissory note, it was held (affirming the judgment of the Court of Session) that one of the two granters, who alleged he was merely a cautioner, was not released. *Robinson v. Edgars and Lyon*, May 11, 1826, - - - II. 106.
2. The Court of Session having found that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring *infamia juris*,—The House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected. *Ritchie v. Mackay*, June 24, 1829, III. 484.
3. Held (affirming the judgment of the Court of Session) that a party sued for payment of acceptances found in his deceased agent's repositories is not entitled to enter into an accounting on vague allegations of intromissions by the agent, the creditor in the bills, it being admitted that the defender had received great advances from the agent, and the correspondence proving that, after the date of the bills sued on, the agent complained to the defender that no exertions had been made towards repayment. *Earl of Strathmore v. Ewing*, June 19, 1832, - VI. 56.
4. Found (reversing the judgment of the Court of Session) that it is incompetent for a married woman to make herself liable upon bills of exchange. *Earl of Strathmore v. Ewing*, June 19, 1832, - - - VI. 56.
5. Circumstances under which it was held, without reference to oath (affirming the judgment of the Court of Session), that a party was not an onerous *bonâ fide* holder of a bill, and that the bill having been granted without value, he was not entitled to recover. *Hunter v. George's Trustees*, May 13, 1834, VII. 333.

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### BILL OF EXCHANGE—*continued*

6. After a bill had been protested, and diligence executed against the drawer and acceptor, at the instance of an onerous indorsee, a party, at the request of the acceptor, retired it, by granting his own bill at six months, but stipulated for an assignation to the bill and diligence:—Held, that he had recourse against the drawer, after he had been obliged to retire his own bill; and that this was not barred by the acceptor of the original bill being allowed time, till the new bill fell due, to provide funds for retiring the original one, without any communication with the drawer. *Leslie v. Shepperd*, May 30, 1834, - VII. 457.  
See *Oath*, 2.—*Payment*, 2.—*Presumption*, 1.

### BONA ET MALA FIDES.

1. The House of Lords having, on the 31st July 1822, found (reversing a judgment of the Court of Session) that sales made judicially upwards of thirty years previously, under a private statute, of parts of an entailed estate, were null, in respect of certain minor heirs of entail not having been properly brought before the Court; and that one of those heirs, who succeeded to the estate, was entitled to have the land so sold restored to him; and the Court of Session having found the purchasers were *bona fide* possessors till the 31st July 1822, and not bound to account for the rents till Martinmas thereafter, and found neither party entitled to expenses;—The House of Lords reversed the judgment to the effect of finding the purchasers accountable for the rents due at Martinmas, without prejudice to any claim they might have for the crops of lands in their own possession reaped prior to that term; and quoad ultra confirmed the judgment. *Agnew's Executrix v. Stair, &c.*, July 22, 1828, - - III. 286.
2. Circumstances under which (affirming the judgment of the Court of Session) it was found, 1, that a party possessing under a long lease, in violation of an entail, was not entitled to claim meliorations from a succeeding heir of entail; and, 2, that he was liable in violent profits from the date of the judgment of the Court of Session reducing the lease. *Innes v. Executors of Alexander Duke of Gordon*, Nov. 10, 1830, - - IV. 305.
3. Held (affirming the judgment of the Court of Session) that an heir who continued in possession of a farm after the death of the tenant, on a supposed right vested in the heir by the terms of the lease was not liable in violent profits prior to the judgment of House of Lords (reversing that of the Court of Session) finding that the heir had no right. *Carnegy v. Scott*, Dec. 9, 1830, - - - - - IV. 431.
4. Circumstances in which held (affirming the judgment of the Court of Session) that a party holding a deputation to a public office by virtue of a commission vitiated in substantialibus was accountable for all the emoluments from the date of citation in an action by a party who had acquired right to the office. *Walker v. Craig*, August 29, 1833, - - VII. 82.

See *Entail*, 1.—*Lease*, 13.—*Public Officer*, 3.

IN THE SEVEN VOLUMES.

BURGH, ROYAL.

1. The Court of Session having found that certain lands, situated within the territory of the royal burgh of Glasgow, which had been disposed by the magistrates in feu-farm for payment of a feu-duty, but to be held burgage, and of which the titles had been made as if held feu, were to be considered as holding feu; and that grain imported within their bounds was not liable to certain burgh dues called ladle dues; and that a clause of thirlage did not apply to invecta et illata;—The House of Lords remitted the case for the opinion of all the Judges. Magistrates of Glasgow v. Dawsons and Mitchell, May 22, 1826, (see *infra*, 4,) - - - - - II. 230.
2. The Court of Session having found that there was not sufficient usage established to modify the written set of a royal burgh,—The House of Lords remitted to make further inquiries. Gardner and others v. Reekie and others, March 23, 1827, - - - - - II. 531.
3. Held (affirming the judgment of the Court of Session), 1, that it is not competent to raise an action of reduction of an election of magistrates of a royal burgh, made in virtue of a royal warrant, after the expiration of two months from the date of election; 2, (reversing the judgment) that as the statute 16 Geo. II. c. 11. ordains costs to be given to the successful party the defenders resisting the reduction ought to have got expenses; and, 3, that an appeal in regard to these expenses was competent. Tod and others v. Tod and others, March 26, 1827, - - - II. 542.
4. (1.) Circumstances and clauses in titles held (affirming the judgment of the Court of Session) to constitute a burgage tenure, and not a feu. (2.) In a grant by burgage holding the town clerk is alone entitled to act as notary, and the sasine must be registered in the books of the burgh. (3.) Held (reversing the judgment of the Court of Session) that a clause of thirlage of grana crescentia, having these words adjoined, “and other stuff and corn they shall happen to grind, seed and horse corn and bear excepted,” does not import a thirlage of invecta et illata. Dawson and Mitchell v. Magistrates of Glasgow, March 31, 1830, (see *supra*, 1,) - - - - - IV. 81.
5. The town council of a royal burgh was empowered by the set, in the event of the person elected dean of guild by the guildry not producing evidence of his qualification to hold the office, to elect a dean of guild themselves; but they, in respect the party elected by a majority of the guildry was disqualified, found that another candidate supported by an apparent minority was duly elected, and that the votes for the other candidate, to whom no objection was stated at the meeting of guildry, were thrown away:—Held (affirming the judgment of the Court of Session) that the town council had not exercised their powers under the set, and that the election was null and void. Magistrates of Dundee v. Lindsay, March 17, 1831, - - - - - V. 152.  
See *Process*, 9.



## GENERAL INDEX OF MATTERS

### CAUTIONER.

1. A creditor obtained, in security of a loan of money, a disposition to heritable property, containing an obligation to infest only à me, on which sasine was taken; and he got also bills by cautioners in corroboration of but without prejudice to the heritable security; and it being stipulated that the creditor should convey the property to the cautioners, in the event of their being obliged to pay the debt; but the creditor neglected to get a confirmation of the sasine, whereby the property was carried off by another party:—Held (reversing the judgment of the Court of Session) that one of the cautioners, who was sued for payment of his bill, was by this neglect discharged. *Fleming v. Thomson*, May 23, 1826, - - - II. 277.
2. A curator bonis was appointed to two uncognosced lunatics, and found caution for performance of his duties; and having, by authority of the Court of Session (given in an action of cognition and sale at his instance alone), sold the heritage in which the lunatics were fiars, and become bankrupt, indebted to them in a large balance;—Held (affirming the judgment of the Court of Session) that his cautioners were responsible for the balance, although it was alleged that, as curator bonis, he had no title to insist in a cognition and sale, nor the Court any authority to empower him to sell. *Eaton, &c. v. Murdoch*, July 4, 1828, - - - III. 246.
3. Where parties bound themselves to guarantee S. F. and Co. in reimbursement of all bills drawn by A. on and accepted by them for four years, and to see S. F. and Co. provided with funds to relieve these acceptances before the acceptances fell due; and S. F. and Co. opened an account with A., debiting him with these acceptances, and crediting him with bills remitted by him; and at the end of the first year S. F. and Co. desired him to draw in future on a banking house, (of which the partners of S. F. and Co. were, with others, members,) and the bills were accepted by the bank; but no notice of this was given to the sureties; and before the lapse of the four years A. became bankrupt, indebted in a balance to S. F. and Co.:—Held (affirming the judgment of the Court of Session), 1, that the sureties were not liable for the bills drawn on and accepted by the bank, and were therefore liberated from their obligation at the end of the first year; and, 2, (reversing the judgment) that although there was at the end of the first year a large balance on the account current against A., yet as, by subsequent remittances made by him, it was extinguished, and the ultimate balance arose out of posterior transactions, the sureties were not liable for that ultimate balance. *Speirs v. Houston's Executors, &c.*, May 22, 1829, III. 392.
4. Where each of A. and B., two distressed cautioners, granted to the creditor a bill for one half of the debt, and each endorsed the bill of the other, and C., interposing as cautioner, put his name as endorser on A.'s bill, and as joint acceptor on B.'s; and A. retired his bill, but C. was obliged to pay B.'s bill;—Held

IN THE SEVEN VOLUMES.

CAUTIONER—*continued.*

- (affirming the judgment of the Court of Session) that C. was entitled to relief against A. Inglis v. Walker, March 3, 1830, - - - - - IV. 40.
5. Circumstances in which it was held (reversing the judgment of the Court of Session) that cautioners for a tenant who had stipulated that the landlord should exercise his right of hypothec before calling on them to fulfil their obligation were discharged. M'Tavish v. Scott, &c., Dec. 7, 1830, - - - - - IV. 410.
6. A party bound himself "to guarantee an agent for four per cent. "for commission and guarantee,"—Held (affirming the judgment of the Court of Session) first, that this merely imported an obligation to guarantee the payment of the price for which goods sent to the agent should be sold, and not for his faithful conduct; and, second, that evidence of mercantile men was inadmissible to prove that in practice the words comprehended an obligation to the latter effect. Calder v. Aitchison and Co., Sept. 10, 1831, - - - - - V. 410.
7. A party bound himself in a bond for borrowed money with and for another as cautioner, surety, and full debtor, without a clause of relief, or an intimated bond of relief apart,—Found (affirming the judgment of the Court of Session) not liable after the lapse of seven years, nor barred by paying interest after that period. Scott v. Yuille, Sept. 15, 1831, - - - - - V. 436.
8. A principal debtor in a bond for a cash account with a bank failed, and executed a trust, the deed of accession to which allowed a supersedere of diligence for three years; the bank lodged a claim and affidavit, without signing the deed of accession, and a delay of seven years took place;—Held (reversing the judgment of the Court of Session) that the cautioner was liberated. Mackenzie v. Macartney, Sept. 23, 1831, - - - - - V. 504.
9. Circumstances in which held (affirming the judgment of the Court of Session) that the cautioners of a bank agent were released from their obligation by the conduct of the bank in permitting him to carry on an illegal trade, to violate his instructions, to incur unusual hazard and loss, to become deeply involved, and to commit important irregularities, without the cautioners being apprised. Leith Bank v. Bell, &c., Oct. 1, 1831, - - - - - V. 703.
10. A party in July applied to the sheriff for a warrant to compel delivery of goods alleged to have been deposited for his behoof with a warehousekeeper in January, in security of bills which he had then granted in favour of the owner. At this time the owner was insolvent; and having granted a conveyance of his estate to trustees for behoof of creditors, they agreed to deliver the goods on the party finding caution to account for the proceeds (reserving all claims competent to the creditors); and caution having been found, the goods were delivered:—Held (affirming the judgment of the Court of Session) that, in a question with the cautioners, it was not competent to allege that the goods so delivered were not the same as those consigned, or intended to be consigned, in

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### CAUTIONER—*continued.*

January, and that thereby an illegal preference had been obtained, but that the cautioners were bound to account only on the footing that the goods were the same as those consigned in January. *Douglas v. Brunton and Wardlaw*, August 7, 1834, - - - - - VII. 489.

See *Bill of Exchange*, 1.—*Discharge*, 3.—*Insurance*, 3.—*Minor*, 3.—*Prescription*, *Septennial*.

### CESSIO BONORUM.

Circumstances under which (affirming the judgment of the Court of Session) the benefit of the *cessio bonorum* was granted to a party, on condition of introducing into the disposition *omnium bonorum* a clause revoking all deeds granted by him “which may have had the effect of excluding his *jus mariti* over his wife’s estate and effects, heritable and moveable.” *Pentland v. Glass*, March 23, 1825, - - - - - I. 65.

See *Process*, 25.

### CHURCH.

1. A party, who had for more than forty years made use of part of the interior of an abbey belonging to the Crown as a family burial-place, in virtue of a disposition *à non domino*, but which was not followed by *sasine*;—Held (affirming the judgment of the Court of Session) that he was not entitled to a prescriptive right, or to prevent the officers of state from taking possession of the ground, removing a wall, and clearing away rubbish,—they consenting to inter on the spot the remains of the dead found there. *Ouchterlony v. Officers of State*, June 21, 1825, I. 533.
2. A presbytery designed, under the statute 1663, c. 21., to the minister of the parish a grass glebe out of kirk lands belonging to one of the heritors, whose mansion house had formerly been built on them; and the Court of Session (altering the judgment of the Lord Ordinary) found that the heritor was entitled to object to those lands being so designed, and that the minister was bound to accept a glebe out of other lands, which were not kirk lands, but which were alleged to be equally as good and convenient as those designed by the presbytery; and that he was not entitled to a compensation for the want of a glebe during the litigation:—Held (reversing the judgment of the Court, but affirming that of the Lord Ordinary,) that the minister was entitled to have the glebe designed out of the kirk lands, and to a compensation for the want of it. *Moore v. Belches*, May 21, 1827, II. 558.
3. Found (reversing the judgment of the Court of Session) that the minister of a royal burgh, with a landward parish annexed, is entitled to a manse under the statute 1663, c. 21. *Auld v. Magistrates of Ayr and others*, June 13, 1827, - II. 600.
4. A committee of heritors appointed by the Court of Session to build a church and assess the heritors having been obliged to raise money on their bills to meet deficiencies by the failure of heritors

IN THE SEVEN VOLUMES.

CHURCH—*continued.*

- to pay ;—Held (affirming the judgment of the Court of Session) that the committee were entitled to relief against an heritor *pro ratâ*, although he had paid his full share of the assessment. Forbes, &c. v. Shaw, &c., July 22, 1830, - IV. 300.
5. After the Reformation, when the Crown was in right of the possessions of the bishops, a royal grant was given of certain lands, &c. in Orkney and Zetland, (which had constituted an earldom previously forfeited to the Crown,) together with the whole patronages, including expressly those acquired in consequence of the Reformation, as well as those otherwise belonging to the Crown, all being united into a single earldom and lordship. This earldom was subsequently forfeited and annexed to the Crown; and thereafter, on the restoration of episcopacy, but without obtaining a dissolution of the earldom, there was conferred on one of the new bishops the bishoprick of Orkney, including all the patronages previously belonging thereto, and the teinds and kirks of certain parishes specially mentioned, the benefices of which were declared to be suppressed, and the teinds to belong to the bishop, under burden of planting and providing for ministers, and with a general right of patronage of vicarages. The bishoprick was enjoyed by the several bishops during the subsistence of episcopacy, and all rights belonging thereto reverted to the Crown at the Revolution. Thereafter a dissolution of the earldom having been obtained, and a new grant given:—Held (affirming the judgment of the Court of Session) that this grant formed a title of prescription on which, if followed by possession, to prescribe against the Crown (as coming in place of the bishop) right to the patronage of the parishes specially contained in the titles of the bishoprick. The King's Advocate v. Dundas, Oct. 1, 1831, - - - - - V. 723.
6. Held (affirming the decree of the Court of Session) that the town council of Edinburgh, as patrons, were entitled to appoint an assistant and a successor to a minister who was disabled by age from performing the duties of the office, the minister giving his consent to the appointment. Luke v. Magistrates of Edinburgh, August 15, 1832, - - - - - VI. 241.
7. Where the population of a parish has greatly increased, so that there is not sufficient accommodation in the parish church for such increase, and the church is not ruinous, nor in such a state as to require rebuilding:—Held (affirming the judgment of the Court of Session) that the heritors are not bound to enlarge the old or build a new church to accommodate such increased population. Question, Whether the assessments should be on the real or the valued rent? Miller v. Earl of Glasgow and others, April 7, 1834, - - - - - VII. 185.

See *Jurisdiction*, 4.

CLAUSE.

1. Found (affirming the judgment of the Court of Session) that a clause in a procuratory of resignation, "that the eldest son, and

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### CLAUSE—*continued.*

- “ the descendants of his body, shall always succeed preferably to “ the younger sons and their descendants,” did not alter or qualify a destination in the dispositive clause to heirs male of the marriage; whom failing, heirs male of any other marriage; whom failing, heirs female of the marriage; so as to let in a daughter of the eldest son (his issue male failing) in preference to that eldest son’s next brother. *Grahame, &c. v. Grahame*, June 14, 1825, - - - I. 353.
2. Clause held (reversing the judgment of the Court of Session) to import a discharge by a daughter of all the rights competent to her as heir of provision under the postnuptial contract of her father and mother. *Magistrates of Montrose, &c. v. Ewen*, June 28, 1825, - - - I. 595.
3. Where a party feued a steading of ground in Clyde Street, “with “ a proportional part of the water-side grass, which is to be a common property to the vassals of Clyde Street in all time coming:” —Held (affirming the judgment of the Court of Session) that the property of the water side grass, and not merely a servitude, was conveyed. *Logans v. Wright, &c.*, April 2, 1831, - V. 242.
4. (1.) Construction of an agreement under which the appellant was bound, not merely to account for, but to pay 2,000*l.*; and interim decree granted for the same affirmed. (2.) Incompetent to control the agreement by extrinsic evidence. *Baillie v. Baillie and others*, July 12, 1833, - - VI. 498.
- See *Fee and Liferent*, 3. — *Heir and Executor*, 2. — *King*, 2. — *Lease*, 5. — *Obligation*. — *Partnership*, 7. 10. — *Revocation*. — *Superior and Vassal*, 1. 3. — *Testament*, 6. 7. 11. — *Trust*, 6. — *Writ*, 1.

### COAL.

A party who had a reserved right of coal in an estate carried an existing level under the bed of a stream into adjoining lands (to the coal of which he had also right) so as to drain the coal of those lands, and brought the water within the estate, and, by means of a steam engine, there raised it, and threw it on part of the surface of the estate:— Found (affirming the judgment of the Court of Session) that he was not entitled to do so. *Tait’s Trustee v. Ballendene*, March 29, 1834, - VII. 163.

See *Lease*, 6. — *Prescription*, 2.

### COLLEGE OF JUSTICE.

Found (affirming the judgment of the Court of Session) that it is the privilege, and has been the practice, of the Court of Session to regulate the accommodation necessary for the different bodies composing the College of Justice in the Inner and Outer Houses; that the incorporation of solicitors have no right to demand any specific accommodation beyond what is necessary for attending the daily business of the court; that such accommodation had been assigned to them equally with other agents; and that an action at the instance of the incorporation, for further special and general accommodation as a matter of right, and particu-

## IN THE SEVEN VOLUMES.

### COLLEGE OF JUSTICE—*continued.*

larly in relation to the conclusion that they had any real and just right and title, with any other class of practitioners, to possess the areas set apart for practitioners and others, is incompetent. Solicitors of Supreme Courts v. Writers to the Signet, June 10, 1825, - - - I. 348.

COMMISSION. See *Agent and Principal*, 3.

### COMPENSATION.

1. A party having brought an action for payment of a legacy, and compensation being pleaded on an illiquid debt;—Held (reversing the judgment of the Court of Session) that there was not satisfactory evidence of the debt on which the compensation was founded. Reid v. Hope's Trustees, May 6, 1825, I. 172.
2. A plea of compensation, founded on an alleged disputed claim, repelled (affirming the judgment of the Court of Session). Downe, &c. v. Pitcairn, &c. June 24, 1829, - - - III. 472.

COMPETENT AND OMITTED. See *Process*, 30.

### COMPETITION.

An estate was sold under burden of the price, being 60,000*l.*, and the interest of 10,000*l.*, being part of the price, was to be liferented by the purchaser, (who had married the daughter of the seller,) and the purchaser became bankrupt, and the estate was judicially sold, and produced a sum inadequate to pay the price:—Held, in a question between the three daughters of the seller as heirs-portioners, (affirming the judgment of the Court of Session,) 1, that two of them were entitled to be ranked on the interest of the 10,000*l.*, to the effect of realizing full payment of their shares of the price, to the exclusion of their sister during the life of her husband the purchaser. Napier v. Gordon, October 3, 1831, - - - V. 745.

See *Bankruptcy*, 1.—*Fee and Liferent*, 2.—*Foreign*, 6.—*Right in Security*.—*Service*.—*Trust*, 12.

COMPOSITION CONTRACT. See *Bankruptcy*, 1.

### CONDITION.

1. Held (reversing the judgment of the Court of Session), 1, that a canal company who, in order to make their canal navigable for vessels drawing four and a half feet water, were authorized to levy certain increased dues, were not entitled to do so before the canal was so navigable; and, 2, that they were liable in repetition of the dues exacted prior to the canal being so rendered navigable. Dixon v. Monkland Canal Company. June 29, 1825, - - - I. 636.
2. A party by his deed of settlement conveyed his lands to trustees, to hold them in trust for his widow's liferent during her life and viduity; and, on her death or second marriage, for two substitutes successively, and their heirs or assignees in fee, whom failing, another substitute (but without calling his heirs or assigns), whom failing, other substitutes; the two first substitutes predeceased the widow, who never married a

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### CONDITION—*continued.*

second time, and the third substitute executed a general disposition, and also predeceased the widow:—Held (affirming the judgment of the Court of Session), 1, that the fee had vested in the third substitute; and, 2, that the general disposition was effectual to evacuate the subsequent destinations. *Leitch and others v. Leitch's Trustees*, Feb. 17, 1829, - III. 366.

3. Circumstances which were held (affirming the judgment of the Court of Session) not sufficient to exclude a grand-daughter claiming under the condition "si sine liberis," from the provision contained in her grandfather's settlement in favour of his children. *Booths v. Black*, August 11, 1832, - VI. 175.  
See *Testament*, 8. 9. 10.

CONDITIONAL INSTITUTE. See *Testament*, 2. 8.

CONDITIONAL OR ABSOLUTE. See *Condition*, 2.

CONSOLIDATION. See *Service*, 1.

CONSUETUDE. See *Burgh, Royal*, 2.—*Public Officer*, 1.

### CORPORATION.

An incorporation having by its bye laws fixed certain rates of annuity payable to different classes of decayed members and widows,—Found (affirming the judgment of the Court of Session) that a widow was entitled to enforce in a court of law her claim as a matter of right, and was not bound to accept the allowance as a payment depending on the pleasure of the incorporation. *Fleshers of Glasgow v. Scotland*, June 20, 1828, - III. 209.

See *College of Justice.—Process*, 12.—*Title to Pursue*, 1.

COSTS. See *Expenses*.

CURATOR. See *Cautioner*, 2.—*Idiotry and Furiosity*, 1.—*Minor*.

DAMAGES. See *Reparation*.

### DEATH-BED.

1. Held (affirming the judgment of the Court of Session) that a deed executed on 6th December was not liable to be reduced *ex capite lecti*, although the grantor died on the 13th, and had been in bad health, confined to bed, and frequently intoxicated, both before and after the execution of the deed; but the disease of which she died arose posterior to its execution. *Mackay v. Davidson, &c.*, March 25, 1831, - V. 210.

2. A party *mortis causâ* conveyed heritage in liege poustie to trustees, with directions to sell, to pay legacies, &c., and then to pay the residue to such persons as she should direct by any writing under her hand; and in default of making such writing to pay the residue to her next of kin; and thereafter executed a writing of directions on death-bed, which was challenged by the heir at law:—Held (affirming the judgment of the Court of Session) that if the heir could set aside such writing he would thereby occasion that default, in the event of which the liege poustie deed had disposed in favour of the next of kin; and therefore he was

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DEATH-BED—*continued.*

barred by want of interest from insisting in a reduction of the deed. *Ker v. Lady Essex Ker's Trustees*, Oct. 1, 1831, V. 718.

See *Entail*, 15.—*Title to Pursue*, 8.

DEED. See *Proof*, 5.

DECLINATURE. See *Process*, 19.

DELICT.

The Court of Session having in general found a party guilty of various charges made against him in a petition and complaint : a remit made *ex parte* to review the judgment, and state in what respects he had been guilty. *Pearson v. Jack*, June 28, 1825, - - - I. 577.

DILIGENCE. See *Writ*, 4.

DISCHARGE.

1. Circumstances under which it was held (affirming the judgment of the Court of Session) that an agreement between partners in trade relative to company matters, "to grant full and competent discharge to each other in full of all bonds, &c. as individuals or partners," did not embrace a bond by one of the partners to another relating to a private transaction between themselves. *Crawfurd v. M'Cormick and Fairie*, May 28, 1827, II. 569.
2. Held (affirming the judgment of the Court of Session), 1, that a discharge of an heritable bond by tutors after the expiration of the tutory is not valid ; and, 2, that the tutors granting such a discharge are liable to repay the amount of the bond to the party to whom they had granted the discharge and against whom the bond has been revived. *Ross, &c. v. Lockharts, &c.*, June 24, 1829, - - - III. 481.
3. Held (reversing the judgment of the Court of Session) that a discharge "of all and sundry claims and demands, debts, and sums of money indebted and owing," did not include a right of relief from a cautionary obligation existing prior to the date of the discharge, but on which the cautioner had not then been distressed, there having been executed, *unico contextu* with the discharge, a disposition in security to the cautioner of whatever sums of money, principal, interest, and expenses, he might advance and pay in consequence of "any cautionary obligations, letter of guarantee, or other such obligations granted or that may be granted." *M'Taggart v. Jeffrey*, Nov. 24, 1830, IV. 361.  
See *Bankruptcy*, 4.—*Clause*, 2.—*Entail*, 1.—*Fraud*, 2.—*Minor*, 2.

DISCUSSION. See *Warrantice*.

ENTAIL.

1. An heir of entail in possession redeemed part of the entailed lands wadsetted under powers in the entail, by taking an unconditional discharge and renunciation, containing a procuratory of resignation *ad remanentiam*, which he, as superior, executed in his own hands ; and, on the supposition that he held the wadsetted lands in fee simple, disposed them to a trustee *mortis causâ* ; and the trustee drew the rents of these lands for several



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### ENTAIL—*continued.*

- years without objection, and paid the same to parties having right under the trust, by whom they were consumed:—Held (affirming the judgment of the Court of Session), 1, that the wadset was thereby extinguished, and did not remain a separate estate or right in the person of the reverser which he could convey to his heir at law; and, 2, that both the trustee and parties to whom the rents were paid were protected by bona fides from repetition. *Duke of Roxburghe v. Wauchope and others*, March 9, 1825, - - - I. 41.
2. A party entailed an estate to himself “in liferent, and to “Henry, my eldest son now in life, in fee, and the heirs male of “his body,” whom failing, a series of substitutes, under prohibitory, irritant, and resolute clauses, by the two latter of which he declared, that “in case the said Henry, or any of the “heirs of taillie,” shall do so and so, and particularly contract debt, “then and in every such case, not only shall all and every “one of such acts and deeds be null and void, but also each “and every heir or person contravening shall forfeit;” and he reserved a power to alter; a few days thereafter he executed a trust deed in favour of Henry and others for payment of debts, so as to relieve the entailed estate, and granted power to them to borrow money, so as to carry on certain mercantile concerns in which he was engaged:—Held (affirming the judgment of the Court of Session), 1, that Henry was included under the resolute clause; and, 2, that the trust deed did not revoke the prohibition in the entail against contracting debt. *Douglas, &c. v. Glassford*, June 10, 1825, - I. 323.
3. A party who was entitled to succeed to two estates as heir of entail, (but the investiture of one of them prevented him, as was understood, from holding both,) repudiated one of the estates in favour of the next substitute, with a reservation of his own and his descendants rights to take the succession of the estate on the failure of that and an immediate subsequent substitute and their descendants, or in the event that the repudiator and his descendants could take the succession consistent with the entail of the other estate; and the next substitute obtained decree of declarator that he was the next heir entitled to succeed under the entail, in consequence of the repudiation, and was served heir of taillie and provision in virtue of these proceedings, and expedite a charter and infestment; but no decree of contravention, irritancy, or forfeiture was obtained against the repudiator:—Found (affirming, with a variation, the judgment of the Court of Session), (1,) that the descendants of the repudiator were not deprived of their rights under the entail by the deed of repudiation, the decret of declarator, or retour of the service, it being now competent for them to hold both estates; (2,) that under the destination to the next substitute, and the heirs male of his body, “quibus deficien. aliis hæredibus quibuscunque “ex corpore dict. J. H.” (the common ancestor of the repudiator and next substitute), the descendants of the repudiator were

IN THE SEVEN VOLUMES.

ENTAIL—*continued.*

called prior to the heirs who, in the entail, were subsequent to the said next substitute; and that at all events the descendants of the repudiator were entitled to reduce the titles made up by that next substitute as contrary to the entail,—the right of that substitute and the posterior heirs not having been secured by the positive prescription, and that of the descendants of the repudiator to reduce having been saved from the negative prescription, by the said next substitute having, within the years of prescription, executed a disposition, in terms of the entail, to himself and the heirs of his body, whom failing, to the repudiator nominatim, and his descendants, on which infestment followed; (3,) that, in order to defend against a challenge of such disposition, it was not necessary for the descendants of the repudiator to reduce the deed of repudiation, decret of declarator, service, and charter following thereon in favour of the next substitute; but that, in order to complete his title, it was competent for him to serve heir of tailie and provision under the entail to the said next substitute as the person last infest in the estate; and, (4,) that the vicennial prescription of retours could not, in such a case, exclude the descendants of the repudiator. Fullerton v. Hamilton, June 20, 1825, I. 410.

- 4 The Court of Session having held that an action concluding for damages at the instance of an heir of entail in possession was competent against the executors of the preceding heir, who possessed under an unrecorded entail in favour of a series of substitutes, containing prohibitory, irritant, and resolute clauses, and who was alleged to have violated the prohibition as to the letting of the lands; and the penalty of the entail being the heir's forfeiture, and nullity of the act itself, and not pecuniary damages;—The House of Lords remitted for the opinion of both divisions. Duke of Queensberry's Trustees v. Marquis of Queensberry, May 22, 1826, (see *infra*, 12,) - - - II. 265.
5. A party executed a deed of entail in favour of an institute, and the heirs male and female of his body, and the heirs male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; thereafter he made a deed whereby he altered the line of succession, and nominated heirs preferably to the heirs female of the institute, and to the other heirs called after the substitution *heredibus nominandis*; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination: The Court of Session held that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former; but the House of Lords remitted for the opinion of both divisions. Stewart v. Porterfield, May 24, 1826, (see *infra*, 20,) - - - - II. 369

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### ENTAIL—*continued.*

6. Held (reversing the judgment of the Court of Session), 1, that the accounts of expenditure by an heir of entail under the statute 10 Geo. III. c. 51. must specify the particulars, and not state merely the sum total expended; 2, that the vouchers or receipts must be granted by the party performing the operations, and not by tenants who have been authorized to get them done, or had right to them by their leases; 3, that a notice given in 1810, and operations performed under it in that year, and thereafter in 1816, and when intervening notices as to other parts of the estate had been made, was not sufficient to authorize improvements in 1816; and, 4, that it is incompetent to award expenses in an action of declarator under the above statute. *Craufurd v. Torrance and Husband*, May 26, 1826, - II. 429.
7. Part of an entailed estate, which was greatly more than sufficient, was sold under the 42 Geo. III. c. 116. for redemption of the land-tax, and no evidence was taken that it could not have been divided, so that an adequate part only might have been sold, or that the sale of the whole would have been more eligible and advantageous for the estate and heir-substitutes than the sale of a part only;—Held, in an action at the instance of an heir-substitute (affirming the judgment of the Court of Session, but superseding their findings), 1, that the sale was not effectual; and, 2, that a singular successor infert, and whose author was also infert, could not be affected by the fraud of his author. *Wilson, &c. v. Elliott*, May 2, 1828, - - - III. 60.
8. Held (affirming the judgment of the Court of Session), 1, that the omission of the words “for new infertment” in an entail made in form of a bond and procuratory of resignation is not fatal to it, the deed being otherwise sufficiently expressed; 2, that a declaration, that in case an heir-substitute succeed to another estate requiring the assumption of a name and title inconsistent with those provided by the entail he shall execute a conveyance of the entailed property to the next heir subject to the fetters, does not free an heir not taking under such conveyance, the fetters being held, on a sound construction of the whole clause, to apply to the heirs universally; and, 3, that a declaration that debts and deeds shall be null and void, so far as they affect the estate, is sufficient, without declaring that they shall be null and void as against the contravener. *Munro v. Munro*, July 25, 1828, - - - III. 344.
9. Held (reversing the judgment of the Court of Session), 1, that the word “dispone” in an entail strikes at leases of extraordinary endurance; 2, that the lease of a loch for 300 years is in no more favourable situation, in a question whether such lease falls under the prohibition to dispone, than any other part of the entailed estate; 3, (affirming the judgment) that a pro indiviso share of a loch forming part of an entailed estate is subject to the fetters of the entail; 4. Circumstances held not to constitute an acquiescence barring the heir of entail from challenging the

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ENTAIL—*continued.*

- lease in a question with an onerous assignee. *Stirling v Dun*,  
 June 22, 1829, - - - - - III. 462.
10. Held (reversing the judgment of the Court of Session) that  
 although an entail contain a prohibition against selling, yet, if  
 the irritant and resolute clauses do not apply to sales, the heir  
 in possession is entitled to sell, and is not bound to re-invest  
 the price in other land. *Stewart v. Fullarton, &c.*, July 16,  
 1830, - - - - - IV. 196.
11. Held (reversing the judgment of the Court of Session) that an  
 entail containing prohibitory and irritant clauses, but no resolute  
 clause against selling, does not create an obligation on the  
 heir selling to re-invest the price in other lands. *Bruce v. Bruce*,  
 July 16, 1830, - - - - - IV. 240.
12. Held (reversing the judgment of the Court of Session) that an  
 action of damages by an heir of entail in possession was not  
 competent against the executors of the preceding heir, who  
 possessed under an unrecorded entail containing prohibitive,  
 irritant, and resolute clauses, and who was alleged to have  
 violated the prohibition as to the letting of the lands, and the  
 penalty of the entail was the heir's forfeiture and nullity of the act,  
 and not pecuniary damages. *Duke of Queensberry's Executors v.*  
*Marquis of Queensberry*, July 16, 1830, (see *supra*, 4,) IV. 254.
13. Held (affirming the judgment of the Court of Session) that an  
 heir under a strict entail is not liable to implement an obligation,  
 granted by a preceding heir in a lease, to pay for the value of me-  
 liorations at its expiration. *Fraser v. Fraser*, Feb. 25, 1831, V. 69.
14. Question remitted, as to the validity of an entail executed by a  
 father who was bound by a marriage contract to secure his estates  
 in favour of the heirs of the marriage, with power to make an  
 entail, and had, as was alleged, exceeded that power. *Macpher-  
 son v. Macpherson and others*, Feb. 28, 1831, - - - V. 77.
15. Held (affirming the judgment of the Court of Session), 1, that,  
 an heir excluded by a deed of entail and deed of nomination  
 of heirs (executed according to the powers of the granter)  
 from an heritable succession in Scotland had no legal title  
 or interest to challenge a trust deed as disposing of that  
 succession in an irrational or otherwise illegal manner; the con-  
 nexion between the trust and the other deeds not being such as  
 to infer that, if the trust-deed were liable to objections from the  
 nature of its provisions, the entail and nomination must thereby  
 be rendered invalid; 2, that the objects and purposes of the trust-  
 deed were clearly and intelligibly expressed; and there is no rule  
 or principle established in the law of Scotland which renders it un-  
 lawful for a man who is *rei suæ arbiter* to appropriate the rents  
 and profits of his estate under a trust in the manner provided by  
 the trust-deed under reduction; that the case of the rents of heri-  
 table estates in Scotland being expressly excepted from the provi-  
 sions of the act 39 & 40 Geo. III. c. 98., while they are clearly  
 extended to personal funds in Scotland, any implication involved

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### ENTAIL—*continued.*

- in that exception is against the supposition of any nullity being understood to be established by the common law of Scotland, in such a trust, for the accumulation of rents or other funds for a limited term; 3, that the heir has no title or interest, under the act of 39 & 40 Geo. III., to challenge the settlement of personal estate; and, 4, that he cannot insist in the reduction of the last deed on the head of death-bed, in respect that his title and interest are excluded by the previous deeds; and the last deed does not revoke but substantially confirms all the prior deeds. *Strathmore v. Strathmore's Trustees*, March 23, 1831, - - - - - V. 170.
16. Held (affirming the judgment of the Court of Session) that an heir under a strict entail was not liable in payment of an account due to a law agent employed by a preceding heir, although by his agency a large part of the estate was restored to the heir of entail. *Fraser v. Vans Agnew*, April 2, 1831, - - - V. 249.
17. Held (affirming the judgment of the Court of Session), 1, that an heir of entail had by acts of homologation rendered himself liable for meliorations under an obligation granted in a tack by a preceding heir; but, 2, (reversing the judgment) that under a clause in a lease providing that the tenant should have right to the difference of value between the houses on the farm at the date of the tack and of those on the farm at the termination of it, the tenant was entitled to the value in so far as the houses on the farm at the date of the tack were improved, or others suitable to the farm built in lieu of the same, and better than the same at the expiration of the tack; but not of houses built new, except as above. *Graham v. Jolly*, June 29, 1831, - - - V. 280.
18. An heir of entail was in possession of estates under an entail restraining him by effective prohibitory, irritant, and resolute clauses from altering the order of succession, but not (as he considered) from contracting debt:—Circumstances in which (affirming the judgment of the Court of Session) a debt which he contracted was to be regarded not as a real debt, but as a collusive and simulate contrivance, with the view to alter the order of succession; and therefore the transaction reduced at the instance of the next heir of entail. The reading of the statute 1685, that a defect in any part of the statutory requisition of an entail vitiated the whole entail, as well in questions with creditors as inter hæredes, rejected by the House of Lords. *Cathcart v. Cathcart*, July 18, 1831, - - - V. 315.
19. Held (affirming the judgment of the Court of Session) that an estate in possession of an heir under a strict entail, on which infestment had followed in his favour, was liable to be adjudged for personal debt contracted subsequent to the infestment, but prior to the recording the entail, although the adjudication was not raised or decree obtained thereon until after the entail had been recorded. Observed, that the case of *Smollett*, May 14, 1807, (*Mor. Dic. App. 12. voce Tailzie*.) was not affected by the

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ENTAIL—*continued.*

- judgment in the House of Lords in the case of Agnew of Sheuchan, July 31, 1822. (1 Shaw's App., page 320) Munro v. Drummond, Aug. 30, 1831, - - - V. 359.
20. A party executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; thereafter he made a deed whereby he altered the line of succession, and nominated heirs preferably to the heirs female of the institute, and to the other heirs called after the substitution hæredibus nominandis; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination:—Held (affirming the judgment of the Court of Session on a remit from the House of Lords) that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former. Stewart v. Porterfield, Sept. 23, 1831, (see supra, 5,) V. 515.
21. Circumstances in which (affirming the judgment of the Court of Session) provisions to younger children granted under an entail giving power to the heirs of tailzie "to provide their younger children to reasonable provisions," were sustained. Earl of Mar v. Lady F. J. Erskine, Sept. 28, 1831, - - - V. 611.
22. (1.) Circumstances under which it was held (affirming the judgment of the Court of Session), 1, that an entail executed in implement of a decree arbitral did not prevent an heir substitute from selling part of the estate; 2, that a sale under a power in the entail, and by authority of the Court, in absence of minor and pupil heirs, was effectual; 3, that the refusal of a bill of suspension presented by a purchaser, relative to another sale, afforded a plea of res judicata; 4, that a sasine written on nine pages, but stated in the docquet to be on eight, was valid. (2.) A posterior entail, inconsistent with the original one, was sustained; and an action was brought by the heirs substitute under the original entail, concluding for reduction of the sales of parts of the estate falling within it, for declarator of irritancy against the heir in possession under the second entail, in respect of his having concurred in those sales, and to have the next substitute found entitled to possess; but that substitute had the succession to the fee propelled to him under the second entail, and was infeft, and enrolled as a freeholder, and voted as such:—Held, 1, that the original entail was annihilated; 2, that the action was not maintainable by that substitute, nor any other suing with him, notwithstanding the renunciation by him of the infeftment, and a decree of reduction, pendente lite, against the other heirs; and 3, that these objections were pleadable by the defenders, although not heirs of entail. Dickson, &c. v. Cuninghame and Medwyn, 1831, - - - - - V. 657.

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### ENTAIL—*continued.*

23. Sale of lands by public roup sustained (affirming the judgment of the Court of Session) which was alleged to have been made in contravention of a strict entail in an antenuptial contract, recorded in the books of Council and Session for preservation, and infetment engrossing the fetters of the entail taken and recorded previous to the sale, but the entail not having been recorded in the register of entails till after the sale. *Grahame v. Grahame*, Oct. 6, 1831, - - - - - V. 759.
24. An heiress of entail under a canal statute obtained 120*l.* per acre for land used for the canal, and a further sum for her consent to a new line deviating from a former one, and which approached nearer to the mansion house than the original one:—Held (affirming the judgment of the Court below) that she was bound to re-invest the sum obtained for such consent, for behoof of the heirs of entail. *Maitland Gibson v. Maitland and others*, June 18, 1833, - - - - - VI. 388.
25. Held (affirming the judgment of the Court of Session) that a trust deed conveying lands for behoof of creditors, and on which the trustee is infet, does not so divest the granter as to prevent him from granting a procuratory of resignation and deed of entail. *M'Millan and others v. Campbell and others*, August 14, 1834, - - - - - VII. 441.
- See *Agent and Client*, 4. — *Bona et Mala Fides*, 2.—*Clause*, 1.—*Heir and Executor*, 1, 2.—*Res Judicata*, 3.—*Service*, 1. 4. 5.—*Title to Pursue*, 4.—*Warrandice*.

ERROR. See *Obligation*, 6.

### EXCLUSIVE PRIVILEGE.

1. Held (affirming the judgment of the Court of Session), 1, that the right of printing bibles, and certain other books, (enumerated in the patent granted by the Crown to the King's printers in Scotland,) and of prohibiting their importation, belongs exclusively to the King, as part of the royal prerogative in Scotland, and, by virtue of his patent, to the printers appointed by him; and, 2, (reversing the judgment) that the privilege and prohibition extended to the "Book of Common Prayer," as well as to the other books mentioned in the patent. *Manners and Miller v. King's Printers*, July 21, 1828, - - - - - III. 268.
2. Held (affirming the judgment of the Court of Session) that the Society of Solicitors before the Sheriff Court of Edinburgh have no exclusive privilege of practising before the Court of the Sheriff Substitute of Leith. *Society of Solicitors v. Smillie, &c.*, Nov. 24, 1830, - - - - - IV. 370.
- See *Public Officer*, 1.

EXECUTOR. See *Heir and Executor*.—*Trust*, 8.

### EXHIBITION.

Held (reversing the judgment of the Court of Session) that a party who had been served heir of provision under a charter conveying lands and the dignity of a peerage, but whose right to

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EXHIBITION—*continued.*

the peerage had not been ascertained or recognized by the Crown, was not entitled to insist in an action against another party, having right to the lands, concluding for exhibition and delivery of all titles relative to the peerage as his own proper writs. Craufurd v. Campbell, May 26, 1826, - - II. 440.

See *Service*, 1.

EXPENSES.

1. Circumstances in which, although pursuers were partially successful, yet, as the defenders succeeded in regard to disputed counter claims, the defenders were entitled to their expenses. Strachan and Gavin v. Paton, &c., Feb. 22, 1828, - III. 19.
2. Two parties to a cause having,—the one pending the cause, and the other after he was cited as a haver,—destroyed documents,—Held (reversing the judgment of the Court of Session) that they were not entitled to the expenses of a petition and complaint presented against them in respect of these acts; and that the latter acted with indiscretion, and was liable in expenses. Robertsons v. Alexander, &c., Feb. 4, 1831, - - V. 1.
3. Circumstances in which expenses ordered to be paid on both sides out of a trust estate. Strathmore v. Strathmore's Trustees, March 23, 1831, - - - - V. 170.
4. A party raised an action for 219*l.* 10*s.* 3¼*d.*, and the defender offered payment of 11*l.* and 10*l.*, with interest, but subject to such qualifications as did not amount to a tender; decree was pronounced against the defender for those sums, with interest, amounting to 42*l.*, and the pursuer was found liable in expenses:—Held (reversing the judgment of the Court of Session) that the pursuer was not liable in expenses. Brodie v. Sinclair, Sept. 23, 1831, - - - - V. 567.
5. Held competent to award the prior expenses to a party who was successful in a former appeal. Dick v. Cuthbertson, Oct. 1, 1831, - - - - V. 712.
6. The Court of Session having, in an advocacy, found the advocator entitled to the expenses of the whole suit, including those incurred in the original action as well as in the advocacy, the House of Lords altered, and found the appellant (the original defender) entitled to all the expenses in the advocacy, up to the date of and including the Lord Ordinary's judgment; but that the appellant and respondent ought respectively to bear their own expenses in the advocacy in the Inner House, and of the appeal. Robertson v. Harford and others, March 6, 1832, - - - - VI. 1.
7. Circumstances in which, while the decision of the Court below was affirmed on the merits, it was in part reversed as to expenses. Hunter v. Duff and others, August 11, 1832, - VI. 206.
8. Expenses awarded against a defender in a process of proving the tenor. Rintoul v. Boyter, June 27, 1833, - VI. 394.
9. The expenses incurred in trying the validity of a trust conveyance for charitable purposes, and to the exclusion of the heir at



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### EXPENSES — *continued.*

law, ordered to be paid out of the trust funds. *Cameron v. Mackie and others*, August 29, 1833, - VII. 106.

See *Bankruptcy*, 17.—*Burgh, Royal*, 3.—*Idiotry and Furiosity*, 1.—*Obligation*, 2. 3.—*Process*, 4. 7. 30.—*Testament*, 6.—*Wreck*.

FACILITY. See *Fraud*, 1.

FACULTY. See *Entail*, 5. 20.

### FEE AND LIFERENT.

1. A lady who was heir of provision to certain estates having by her contract of marriage, in the event of succeeding to them, disposed them, "under the reservation of her own and her husband's liferent right and use thereof," "to and in favour of the heir male of this marriage;" and having succeeded to them;—Held, in a question between her and the heir male of the marriage (affirming the judgment of the Court of Session), that she was fiar of the estates. *Campbell's Trustees v. Campbell*, May 5, 1825, - - - - - I. 161.
2. A party sold his estate to his son in law, under burden of the price, payable at certain stipulated periods, and declared that the interest of part of the price should be liferented by his son in law and his wife, and the property vested in their children (of whom one was then alive), and the price was not paid;—Held (affirming the judgment of the Court of Session), 1, that the fee belonged to the children, and not to their parents; and, 2, that they were preferable on the price to the heirs ab intestato of the seller. *Napier and Crombie v. Scott and others*, May 14, 1827, - - - - - II. 550.
3. Clause of a deed held (affirming the judgment of the Court of Session) to create a trust so as to carry the fee to children, and a liferent to the father. *Mein v. Taylors and others*, Feb. 23, 1830, - - - - - IV. 22.  
See *Condition*, 2.—*King*.—*Locus Pœnitentiæ*.—*Revocation*, 2.

FEE OR SPES SUCCESSIONIS. See *Trust*.

### FERRY.

Held (affirming the judgment of the Court of Session) that steam boats carrying only passengers and their baggage fall within the description of "ferry boats or passage boats" in the statute 28 Geo. III. c. 58. and relative tables regulating the dues exigible at Leith and the adjacent bounds, and are liable only to pay rates as such. *Magistrates of Edinburgh, &c. v. M'Farlane and others*, March 30, 1830, - - - - - IV. 76.

### FISHING.

1. A party holding a right of salmon fishing found, in a question with an adjacent heritor (affirming the judgment of the Court of Session), to have no right to erect sights and towing paths on the alveus of the stream; but the House of Lords remitted to the Court of Session to inquire whether a bulwark or embankment built by the adjacent heritor against the stream was so constructed as to be injurious to the right of fishing in the water,

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FISHING—*continued.*

- and in a manner not necessary to its utility as a bulwark or embankment. Forbes and others v. Smyth, June 28, 1825, I. 583.
2. Found (affirming the judgment of the Court of Session), 1, that stake-nets erected on the proper shore of the sea are not illegal; and, 2, that proprietors of salmon fishings in an adjacent river have no title to object to heritors on the sea coast, who hold a right of fishing by net and coble from the Crown, exercising their right by stake-nets. Kintore v. Forbes, &c., July 11, 1828, - - - III. 261.
  3. Circumstances under which (affirming the judgment of the Court of Session) a party was found entitled to challenge a yair erected by another in a loch for catching salmon, although it was alleged that it was erected in virtue of a title derived from the predecessor of the objector. Duff v. Fraser, Feb. 23, 1831, - - - V. 57.
  4. A party having brought an action, libelling that he was tacksman of the whole salmon fishings in a firth, and proprietor of other fishings in certain rivers flowing into it, against a proprietor of lands situated in the firth, and to have it found that the defender had no right to fish salmon ex adverso of his own lands, at which part of the river the pursuer had no right of fishing, either in tack or property:—Held (affirming the judgment of the Court of Session), 1, that, although a preliminary objection to his title had been repelled, it was still competent to the defender to object to it as a title to prevail; and, 2, that the title was not sufficient to warrant his obtaining a declarator of no right of fishing against the defender. Mackenzie v. Houston, Aug. 13, 1831, - - - - - V. 422.
  5. A party, alleging an exclusive right of fishing salmon and all other fish in a river, to the banks of which he had no right, but to the waters of which, as well as to the fishings, he claimed an absolute and exclusive right, raised actions of declarator, suspension, and interdict against the proprietor of lands adjacent to and bounded by the river, and infest on titles, conveying the lands ‘cum pertinentibus,’ and supposed also ‘cum piscationibus,’ who claimed a right to fish for trout and other fish ex adverso his lands. The House of Lords affirmed the judgment of the Court of Session, holding that the latter proprietor did not require to prove prescriptive exercise of such right of fishing; but that, independent of such prescriptive possession, he had a right to fish trouts in the river ex adverso his property, with trout rods, but not with net and coble, or in any way prejudicial to the former party’s salmon-fishing. Mackenzie v. Rose, May 14, 1832, - - - VI. 31.

See *Interdict*, 1. 2.—*Possessory Judgment*.—*Process*, 22.—*Res Judicata*, 4.

FOREIGN.

1. An Englishman residing in England died indebted to certain parties in Scotland, arising out of mercantile transactions, and he was creditor of persons resident in Scotland, against whom he had raised actions in the Court of Session; having died, his executors, who administered in England, claimed in a Scottish

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### FOREIGN—*continued.*

- sequestration, and sisted themselves as parties to the actions, but did not confirm in Scotland; and the Scottish creditors obtained from the Judge Admiral letters of arrestment jurisdictionis fundandæ causâ against the executors, and thereupon arrested in the hands of the Scottish debtors to the defunct:—Held (affirming the judgment of the Court of Session) that the arrestment was inept to the effect of founding a jurisdiction against the executors. *Stirling and others v. Houston and others*, May 20, 1825, - - - - - I. 199.
2. A native of Scotland domiciled in India, but who possessed heritable bonds in Scotland, as well as personal property there and in India, executed a will in India, ineffectual to carry Scotch heritage; and a question having arisen, whether his heir at law (who claimed the heritable bonds as heir) was also entitled to a share of the moveables as legatee under the will;—Held (affirming the judgment of the Court below) that the construction of the will, as to whether it expressed an intention to pass the Scotch heritable bonds, and the legal consequence of that construction, must be determined by the law of England. *Trotter v. Trotter*, June 10, 1829, - - - - - III. 407.
3. Judgment having been pronounced in a competent court in the United States of America finding a Scottish legatee entitled to a legacy under a settlement executed in the United States of America by a Scotchman domiciled there;—Held (affirming the judgment of the Court of Session) that under the circumstances an offer to prove by the opinion of American counsel, that the clause in the settlement conveying the legacy did not import a right of fee, but only of liferent, was inadmissible. *Brown v. Brown*, March 3, 1830, - - - - - IV. 28.
4. Held (reversing the judgment of the Court of Session) that English assignees under a commission of bankrupt have no power to homologate a trust-deed executed by the bankrupts in relation to their effects in Scotland, which, it was alleged, fell under the commission. *Stein's Assignees v. Brown, &c.*, Feb. 23, 1831, - - - - - V. 47.
5. Held (affirming the judgment of the Court of Session) that a trust-disposition of heritage duly tested, containing a direction to the trustee to convey to any person to be nominated by the truster, together with a testament executed according to the forms of Jamaica, where the truster resided, but not of Scotland, bequeathing his heritage to a particular person, constituted an effectual right in favour of that person, exclusive of the heir at law. *Brack v. Johnston and Hogg*, Feb. 25, 1831, - - - - - V. 61.
6. Part of an entailed estate was sold for redemption of the land tax, and the surplus price lodged in bank, and thereafter lent out on heritable security by the statutory trustees; the heir apparent under the entail, during the life of the heir in possession, for onerous causes, executed in England an assignation in the English form of his right to draw the interest thereof during his life, and after his succession granted a general disposition of all

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FOREIGN—*continued.*

his property to a trustee for behoof of his creditors, with a special disposition of his life interest in the entailed estate, on which the trustee was infest:—Held, in a competition for the interest of the surplus price, (affirming the judgment of the Court of Session,) that the right to draw it was carried by the assignation, and could not be defeated by the subsequent disposition to the trustee.

Scott v. Allnutt, Sept. 10, 1831, - - - V. 416.

See *Approbate and Reprobate.*—*Heritable and Moveable.*—*Insurance*, 1.—*Parent and Child.*—*Res Judicata*, 2.—*Trust*, 11.

FORUM ORIGINIS. See *Jurisdiction*, 2.

FREEHOLD QUALIFICATION. See *Sasine*, 1.

FRAUD.

1. A daughter and her husband obtained from her father, who was eighty-three years old, facile, and addicted to habits of intoxication, a deed in the shape of an agreement and obligation between them and him, by which he conveyed to them, without any onerous consideration, funds of the value of about 4,000*l.*, reserving an annuity of 40*l.* out of these funds; and which deed was prepared by their agents without the intervention of any man of business on his part, and under the erroneous impression that unless he executed it he might be reduced to poverty:—Held (affirming the judgment of the Court of Session) that the deed was not binding on him. *M'Diarmid v. M'Diarmids*, March 28, 1828, - - - III. 37.

2. Where a daughter had rights under her father and mother's contract of marriage, and the father, at a time when she and her husband had just attained majority and were in pecuniary distress, and the husband was about to sail to India, obtained a discharge from them without the assistance of an agent on their part; and the discharge narrated that it was granted in consideration of 315*l.*, agreed to be given by the father out of his own free will, and from regard to his daughter and husband, (whereas he entertained different sentiments,) and that one half had been instantly paid, (whereas he retained a large part in extinction of an alleged debt, and only gave a promissory note at twelve months for the balance,) and the other half was to be payable at his death:—Held (reversing the judgment of the Court of Session) that the discharge was not binding. *Ewen v. Ewen's Trustees*, Nov. 17, 1830, IV. 346.

See *Assignment*, 1.—*Entail*, 18.—*Idiotry and Furiosity*, 2. 3.—*Lease*, 10.—*Prescription*, 3.

FRAUDULENT BANKRUPTCY. See *Jurisdiction*, 1.

GENERAL DISCHARGE. See *Discharge*.

GLEBE. See *Church*.

HARBOUR. See *Ferry*.

HEIR AND EXECUTOR.

1. An heiress of entail in possession having bound herself and the proprietor, at the end of a lease, to pay certain sums to the tenant for meliorations, but not having constituted them against

## GENERAL INDEX OF MATTERS

### HEIR AND EXECUTOR—*continued.*

- the estate in terms of the 10 Geo. III. c. 51. ;—Held (affirming the judgment of the Court of Session, with certain variations as to illiquid claims,) that the executor of the heiress, and not the succeeding heir of entail, was liable. *Moncreiff v. Tod and Skene*, May 27, 1825, - - - - I. 217.
2. (1.) A party executed an entail of an estate in favour of a certain series of heirs, declaring that the heirs should be bound “to pay and perform all debts payable and prestable by me or my ancestors, and every other claim and demand to which the said lands and others, or any part thereof, are now or may happen by law to be subjected or made liable,” and also, *unico contextu*, a general disposition of the estates of which he should die possessed in favour of the same heirs, under a declaration that “the real and personal estate hereby conveyed is and shall be burdened with the payment of all my just and lawful debts;” and the succession to the entailed and unentailed properties having afterwards gone to different parties:—Held, in a question between them, (reversing the judgment of the Court of Session) that the two estates were liable in relief *pro rata* of a debt constituted by the granter over them both.
- (2.) A legacy was left by the granter of the above deeds, payable by one of the heirs and his representatives, in case of his succeeding to the estates; and he did not succeed, and his representative got only a part of the succession, while the other part went to the legatee:—Held (reversing the judgment of the Court of Session) that the legacy was not exigible. *Moncreiff v. Skene*, June 29, 1825, - - - - I. 672.
3. Circumstances under which a Scotchman having sold a part of his landed estate, and invested a portion of the price in the public funds, and intimated to an heritable creditor in London his intention of paying the debt in six months; but having died before the expiration of that period, and consequently before payment;—Found (affirming the judgment of the Court of Session) that the deceased’s residuary legatee was bound to free and relieve the landed estate, and the heir of entail, of that heritable debt. *Earl of Minto v. Elliot*, June 29, 1825, - - - - I. 678.\*
4. A purchaser of an estate over which there was an heritable debt bound himself to pay it as part of the price, received a discharge of the price on that footing, and granted a personal bond of corroboration to the creditor;—Held (affirming the judgment of the Court of Session), in a question between the heir and executor of the purchaser, that the debt was heritable, and formed a burden on the heir. *Lowthian’s Heirs-Portioners v. Executors of Lowthian*, March 3, 1826, - - - - II. 40.
5. A husband possessed of property in Jamaica bound himself, by marriage articles, to secure to his wife, in case of her surviving him, an annuity of 400*l.* payable out of his Jamaica estates; and binding himself, in the event of purchasing lands in

\* See also Vol. VI. p. 381.

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### HEIR AND EXECUTOR—*continued.*

Scotland, to take the titles to himself and wife in joint fee and liferent, in further security of the annuity; and bought lands in Scotland, but he took the titles to himself and his heirs alone, and died;—Held (reversing the judgment of the Court of Session), 1, that the annuity constituted a proper burden on the Jamaica estate, and not on the Scotch estate; and 2, that a party taking the former under a testamentary deed had no relief against the heir succeeding to the estate in Scotland. *Ogilvie v. Dundas, Lindsay, and others*, May 22, 1826, II. 214.

6. Where a party who had money in bank executed a will, in which he nominated his son executor, who was a partner of a company indebted to the bankers; and the bankers, by authority of the son, transferred the money to his individual account, taking a discharge from him *quà* executor; and thereafter transferred it to an account in name of the company, whereby the debt due to the bankers was extinguished; and the Court of Session (in a question with a party having a beneficial interest under the will) found the bankers not liable to account;—The House of Lords reversed, and remitted an issue to ascertain whether the bankers were in the knowledge that the money was part of the funds of the defunct, and held by the son *quà* executor, and subject to the trusts of the will, and that those trusts were not satisfied. *Taylor v. Sir W. Forbes and Co., &c.*, Dec. 14, 1830, IV. 444.

See *Entail*, 4.—*Warrandice*.

### HERITABLE AND MOVEABLE.

Where a party sold heritable subjects by missives, and the price, payable at a future period, was declared a burden on the subjects;—Held (affirming the judgment of the Court of Session) that the price was heritable, and not carried by an English testament. *Mead v. Anderson*; Nov. 16, 1830, - IV. 328.

See *Foreign*, 6.

### HOMOLOGATION.

One of the next of kin of a defunct having been named a trustee in a trust deed by the defunct, and having accepted, and taken benefit under the deed,—Held not barred from claiming the residue as belonging to him and the other next of kin. *Crichton v. Grierson, &c.*, July 25, 1828, - - III. 329.

See *Entail*, 9. 17. 22.—*Foreign*, 4.—*Partnership*, 15.

### HUSBAND AND WIFE.

1. Held (reversing the judgment of the Court of Session), 1, that a woman having failed to establish a marriage, which she alleged was constituted by certain written documents in which she was recognized as the defender's wife, was not entitled to found on them to the effect of obtaining a permanent aliment during her life, she being fully aware that they had been given not *intuitu matrimonii*, but for another purpose, and not alleging that she had been seduced; and, 2, that it is incompetent to award interim aliment in a declarator of marriage resting on the mere allegation of the pursuer, and while no evidence of the marriage

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### HUSBAND AND WIFE—*continued.*

- has been produced. *Campbell v. Sassen and M'Kenzie*, May 23, 1826, - - - - - II. 309.
2. A party raised a declarator of marriage and adherence against a woman, whom he alleged was his wife, stating in the summons an irregular marriage followed by consummation at Holytown, and the celebration of that marriage by a subsequent regular marriage in facie ecclesiæ in Edinburgh; the wife denied marriage and consummation at Holytown, and averred that she had not consented ad ipsum matrimonium in Edinburgh, but had been concussed by threats to submit to the ceremony there; and she immediately thereafter entered into a marriage with another party, enjoyed the status of marriage, and had a family; and the alleged first husband was perfectly aware of that status, and expressly recognized her and husband in their character of husband and wife: Found (reversing the judgment of the Court of Session), 1, that there was no proof of the Holytown marriage, nor of any regular marriage in facie ecclesiæ in Edinburgh; and, taking into consideration all the facts and circumstances, that there was not evidence sufficient to justify the conclusion that the parties did, on the day when the Edinburgh marriage was said to have been celebrated, or at any other time, voluntarily and deliberately express a real mutual consent immediately to contract marriage; 2, Question raised, but not decided, whether, in a case where the alleged first husband had been aware of the second marriage in the manner proved, a court of justice, even if they felt themselves bound to discern in the declarator of marriage, would discern in the conclusion of adherence, and the restitution of conjugal rights, either in relation to cohabitation or patrimonial interests? *Jolly v. M'Gregor*, June 20, 1828, - - - - - III. 85.
  3. Held (affirming the judgment of the Court of Session), 1, that under a summons libelling a marriage chiefly on a consent per verba de præsentis, but also alleging that it would be otherwise proved by facts and circumstances, it was competent to find a marriage proved otherwise than by de præsentis words; 2, that letters, without containing any direct promise, and the conduct of a party, established a promise of marriage, and, being followed by copula, a marriage was constituted. *Honyman v. Campbell, &c.*, March 3, 1831, - - - - - V. 92.
  4. A husband and wife executed a contract of separation and aliment, whereby the husband bound himself to pay to his wife during her life and separation an annuity of 30*l.* per annum, in consideration of which she renounced all legal claim against him, and the husband died while the contract of separation was unrevoked:—Held (affirming the judgment of the Court of Session) that the wife was not bound by that contract of separation, but was entitled to her legal provision as his widow, the annuity not being fair, onerous, and adequate, in the pecuniary circumstances of the husband. *Hunter v. Dickson*, Sept. 19, 1831, V. 455.
  5. Circumstances under which held that a married woman was



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HUSBAND AND WIFE—*continued.*

entitled to sue for damages on account of slander without the concurrence of her husband. *Ewing v. Cullen*, August 24, 1833, - - - VI. 566.

6. A married woman, whose husband was abroad under sentence of transportation, having been found entitled to pursue an action of count and reckoning, with concurrence of a curator ad litem, and the defender's estates being sequestrated:—Held (affirming the judgment of the Court of Session) that she was entitled to vote in the election of a trustee without her husband's concurrence. *Paul v. Gibson*, June 14, 1834, - - - VII. 462.
7. Circumstances in which it was held (affirming the judgment of the Court of Session) that the *jus mariti* was excluded as to the interest on two heritable bonds, in which the husband was debtor and the wife creditor; and that adjudications accumulating the principal and interest in her favour were valid. *Robertson v. Robertson*, August 15, 1834, - - - VII. 526.

See *Bill of Exchange*, 4.—*Entail*, 13.—*Parent and Child*.—*Process*, 10.—*Revocation*, 1.—*Sale*, 2.—*Sasine*, 3.—*Trust*, 3.

IDIOTRY AND FURIOSITY.

1. The Court of Session appointed a curator bonis to a party alleged to be fatuous; and, on an application by him and his interdictors, refused to recall the appointment, and repelled an objection that his fatuity could only be ascertained by the verdict of a jury; and having found both his interdictors and agent liable in expenses to the curator;—The House of Lords remitted to review the judgments on the merits, reserving the question of expenses; and thereafter, having obtained the opinions of all the Judges, affirmed the judgment without costs. *Bryce v. Graham*, May 26, 1826, II. 481.; July 23, 1828, III. 323.
2. Held (affirming the judgment of the Court of Session) that a deed of settlement was not effectual which had been executed by a party who was found by the verdict of a jury to be capable of disposing of her estate, but not in such a state of mind as to enable her to judge correctly with regard to the effect of the deed as depriving her of all power of revoking or altering it, and as not being her free and voluntary act, although not obtained by the undue influence of the parties in whose favour it was granted. *Noble's Trustees v. Watson and others*, June 29, 1827, II. 648.
3. Held (affirming the judgment of the Court of Session) that although the granter of a deed of settlement was proved to have been, prior and posterior to the execution of it, addicted to habits of intoxication, yet, as there was no evidence (but the reverse) that she was drunk when executed, it was not reducible. *Mackay v. Davidson, &c.*, March 25, 1831, - - - V. 210.

IMPLIED CONDITION. See *Condition*.

IMPLIED OBLIGATION. See *Obligation*.

IMPLIED REVOCATION. See *Revocation*.

IMPLIED WILL. See *Heir and Executor*, 3.—*Testament*, 1.



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INCORPORATION. See *Corporation*.

INDEFINITE PAYMENT. See *Payment*.

### INHIBITION.

1. The Court of Session found an inhibition on a supplementary action nimious and oppressive, recalled it, and ordered it to be scored in the record, and marked on the margin as done by their authority;—The House of Lords affirmed the judgment in hoc statu, so far as it recalled the inhibition; but reversed it so far as it found the inhibition nimious and oppressive, and ordered it to be scored on the record and marked on the margin. Fullarton v. Hamilton, June 20, 1825, - - I. 531.
2. An heir of entail was found entitled to restitution of part of the entailed estate from purchasers; and they brought an action against him for ameliorations, on which they executed arrestments and inhibition, and the heir had a counter action for bygone rents of a much larger amount:—Held (reversing the judgment of the Court of Session) that the heir was entitled to have the arrestment and inhibition recalled without caution. Agnew v. Bell, July 4, 1825, - - - I. 709.

### INSURANCE.

1. An English insurance company having, through their agent in Glasgow, agreed to insure a steam vessel at sea against fire, —Held (contrary to the judgment of the Court of Session), 1, that such an insurance fell under the statute 6 Geo. I. c. 18.; but, 2, that it was a Scotch contract, and that the statute did not apply to Scotland quoad hoc. Albion Company v Mills, June 27, 1828, - - - III. 218.
2. Found (affirming the judgment of the Court of Session) that a policy of insurance “to Barcelona, and at and from thence, and “two other ports in Spain,” &c., covered a total loss, which happened while the ship insured lay in the roadstead of Saloe, although there were no artificial works or other usual protections for loading and unloading, but the place was resorted to by vessels for trade, and it was treated as a port by the Spanish and British Governments. Sea Insurance Company of Scotland v. Gavin and others, Feb. 18, 1830, - - - IV. 17.
3. A life insurance company lent a sum on condition that the debtor should insure his life with their office to the amount of the debt, and assign to them the policy of insurance; and they took the debtor and his cautioner bound to pay the principal and interest and premiums of insurance. After the debtor's death, they charged the cautioner to pay the sum lent, on the allegation that the policy had been allowed to fall by nonpayment of the premiums; and the cautioner alleged that the manager of the company had accepted from the debtor a bill for the premiums, and agreed to renew the policy. The Court of Session suspended the charge; but the House of Lords remitted, with directions to investigate the facts. North British Insurance Company v. Barker, March 5, 1833, - - - VI. 323.

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### INTERDICT.

1. Circumstances under which (reversing the judgment of the Court of Session) a party who had been interdicted from fishing by stake-nets within certain bounds was held not to have committed a breach of the interdict. *Dalglish v. Duke of Athole and others*, June 28, 1825, - - - I. 590.
  2. Circumstances in which (affirming the judgment of the Court of Session, with a qualification,) an interdict was renewed against fishing in part of a river, and although no prayer to that effect was contained in the petition and complaint. *Magistrates of Dingwall v. M'Kenzie*, July 11, 1831, - - - V. 351.
  3. Interdict refused, where it was not proved that the party complained of had done or threatened to do any thing inconsistent with the rights of the complainer. *Weir v. Glenny and others*, April 7, 1834, - - - VII 244.
- See *Jurisdiction*, 6. — *Master and Servant*, 1.—*Nuisance*.—*Property*, 3.

### INTEREST.

1. Where 12,000*l.* of government stock, of the value of 7,620*l.*, were sold for an heritable bond of 10,000*l.* with interest thereon at 5 per cent., but the payment of the principal was dependent on and substantially effected by several contingencies, and in one view the seller and her heirs were exposed to receive for a perpetuity less than 5 per cent. on the sum sold;—Held (affirming the judgment of the Court of Session) that the transaction was not usurious. *Farquharson v. Barstow*, Feb. 17, 1830, - IV. 9.
2. The House of Lords having found a debtor entitled to “deduction of the charge of remittance” of money from India,—Held (reversing the judgment of the Court of Session), 1, that under the above finding the debtor was not entitled to deduction of one year's Indian interest from the debt. *Keble v. Graham's Trustees*, July 14, 1830, - - - IV. 166.
3. Circumstances in which it was held (reversing the judgment of the Court of Session) that a party was not liable for compound interest on an heritable bond granted in 1787, and for payment of which action was raised in 1814, but not proceeded in till 1824, although the delay was alleged to have been caused by the improper acts of the debtor. *M'Neill v. M'Neill or Jolly, &c.*, Dec. 22, 1830, - - - IV. 455.
4. A lady, as executrix *quà* relict, gratuitously undertook “the gradual payment and extinction” of the debts of her deceased husband, “by making payment and satisfaction” thereof out of her estate, chiefly by annual payments, contemplated to be effected in five years; and after a term of years she paid off the greater part of these debts, and in the interim made successive partial payments and adjustments of interest with some of the creditors to a considerable extent; but never paid any interest, arising subsequent to her husband's death, to a certain class of English creditors under bonds or bills; and the House of Lords having found, in a question with the creditors, that the estate was liable for the debts till “paid and extinguished:”—Held

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### INTEREST—*continued.*

(affirming the judgment of the Court of Session) that the estate was liable to the creditors for the interest accruing on her husband's debts while unpaid, although it had cost her a much greater sacrifice of property to pay off the principal than she had any reason to expect at the date of granting the gratuitous obligation. *Lady Montgomerie v. Rundell, &c.*, March 25, 1831, - - - - - V. 201.

5. Circumstances in which (affirming the judgment of the Court of Session) interest on arrear of interest was allowed from the next term after the date of citation of the holder of a fund in a multiplepinding of which he was the nominal raiser. *Napier v. Gordon, &c.*, Oct. 3, 1831, - - - - - V. 745.

6. Accumulation of interest at the date of the action and of the decree not allowed in respect of mora. *J. Mackenzie's Trustees v. A. Mackenzie's Trustees*, Oct. 15, 1831, - - - - - V. 796.

See *Agent and Principal*, 3.—*Master and Servant*, 2.—*Partnership*, 8.—*Payment*, 1.—*Title to Pursue*, 7.—*Trust*, 1. 5.—*Wreck*.

JUDICIAL FACTOR. See *Partnership*, 11.

### JUDICIAL REMIT.

Held (affirming the judgment of the Court of Session) that a party having acquiesced in a judicial remit to a person of skill was not thereafter entitled to insist on a proof in regard to facts reported upon by that person. *Dixon v. Monkland Canal Company*, June 29, 1825, - - - - - I. 636.

### JURISDICTION.

1. Held (affirming the judgment of the Court of Session), 1, that under the act 1696, c. 5., the Court of Session has jurisdiction, exclusive of the Court of Justiciary, as to fraudulent bankruptcy; 2, that although a party was imprisoned on a charge of fraud and fraudulent bankruptcy by a warrant of the Court of Justiciary, yet that letters of intimation under the act 1701, c. 6., from that Court were unavailing to the effect of getting liberation from imprisonment under a charge of fraudulent bankruptcy; and, 3, question raised, as to whether the act 1701, c. 6., applied to proceedings before the Court of Session, and the finding of that Court in the negative superseded. *Duncan v. Lord Advocate*, June 28, 1825, - - - - - I. 608.

2. The Court of Session having sustained their jurisdiction against a Scotchman domiciled in England *ratione originis*, The House of Lords reversed the judgment, and remitted to inquire on what other grounds appearing on the pleadings jurisdiction could be sustained, and having regard to a suit depending in Chancery when the summons in Scotland was raised. *Grant v. Pedie*, July 5, 1825, - - - - - I. 716.

3. A party, who was the owner of a hackney coach, was convicted under the statutes relative to the post-horse duties by a justice of the peace; and it being provided by these statutes, that any party aggrieved "shall and may, upon finding security for the "penalties and costs, appeal to the justices of the peace at the

IN THE SEVEN VOLUMES.

JURISDICTION—*continued.*

- “ next quarter sessions;” and the party, instead of so appealing, presented a bill of suspension to the Court of Session on alleged informalities, and excess of jurisdiction;—Held *ex parte* (affirming the judgment of the Court of Session) that the bill was incompetent. *Craigie v. Mill*, June 25, 1827, II. 642.
4. Held (affirming the judgment of the Court of Session), 1, that the Court of Session have jurisdiction to review and set aside the proceedings of a presbytery under the 43 Geo. II. c. 54. where these proceedings have been irregular and informal; 2, that the omission to take in writing the evidence led before the presbytery is an informality inconsistent with the enactment of the statute, and open to correction by the Court of Session. *Campbell v. Brown*, June 12, 1829, - - - III. 441.
5. Question remitted for the opinion of all the Judges, whether, where a party accused of evading a toll bar has been assoilzied by the justices of peace from a demand for statutory penalties, the Court of Session has jurisdiction, in an advocacy, to find him guilty, and award the penalties. *Morrison, &c. v. Mitchell*, July 14, 1830,\* - - - - - IV. 162.
6. Question, Whether a sheriff can competently entertain a plea in defence against an application for interdict, that the defender had, by implication from the terms of a deed, a right of road, and which plea was not confined to the point of possession, but embraced that of right? *Weir v. Glenny and others*, April 7, 1834, - - - - - VII. 244.
- See *Exhibition.*—*Foreign*, 1.

KING.

1. Held *ex parte* (reversing the judgment of the Court of Session) that the privilege of Royal Palace protects against poinding and letters of open doors within the precincts of the Palace of Holyroodhouse, although His Majesty be not residing there when the diligence is attempted to be executed, the Palace being kept up as a place of royal residence. *Earl and Countess of Strathmore v. Laing*, Feb. 22, 1826, - - - - - II. 1.
2. Held (affirming the judgment of the Court of Session) that a charter granting the office of keeper of the King's Park did not confer any feudal right to the property of it, although it was alleged that acts of proprietorship had been exercised by the keeper for more than forty years; but a remit made to review, and take the opinion of the other Division of the Court as to whether the keeper of the park be entitled, under the terms of the grant and alleged possession for more than forty years, to work quarries in the park? And thereafter found (reversing the judgment of the Court of Session) that the Keeper is not entitled to work quarries in the park to any extent. *Officers of State v. Earl of Haddington*, May 26, 1826, II. 468.; Sept. 24, 1831, V. 570.
- See *Exclusive Privilege*, 1.

KIRK-YARD. See *Church*, 1.

\* See the ultimate decree, 3 Shaw & Maclean, p. 285.

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LAND TAX. See *Entail*, 7.

### LEASE.

1. In a lease of an arable farm situated near a small town, the landlord having reserved right to feu the whole or any parts or portion thereof, allowing recompense in proportion to the rent payable for the whole; and having feued part of the farm by a feu-disposition for a principal sum, with a reddendo of one shilling; and an action of removing having been brought against the tenant; and the Lord Ordinary having decerned in the removing; but the Court having ordered a condescendence as to the practice of feuing lands on the estate, and thereafter assoilzied the tenant:—The House of Lords reversed the judgments of the Court ordering the condescendence and assoilzieing the tenant, and affirmed that of the Lord Ordinary decerning in the removing. *Stewart and others v. Lead*, March 25, 1825, - I. 68.
2. A landlord of several mills on a stream of water advertised them for lease, and represented that they had an abundant and regular supply of water; and a party took one of the inferior mills, without any special stipulation as to the water; and the landlord let the upper mill under the condition that the tenant of it should keep his sluices open at least three hours in the day:—Held (affirming the judgment of the Court of Session) that the tenant of the lower mill was not entitled to withhold payment of his rent, or to claim damages from the landlord, on the ground of having, by the above condition, been deprived of a sufficient supply of water; reserving his claim of damages against the tenant of the upper mill, if he any had. *Aitchison v. Magistrates of Glasgow*, May 4, 1825, - I. 153.
3. A tenant entered to possession of a farm on a missive of lease for nineteen years, prescribing a certain course of cultivation for the first sixteen years, and another during the last three years, under the penalty of paying an additional rent for these last years; and did not comply with the rules so prescribed;—Held (affirming the judgment of the Court of Session) that he was liable in the penal rent, and that it was not a valid defence that he had adopted the same course as the other tenants on the estate, and as was prescribed by their leases, or that he had done so with the knowledge of the landlord. *Miller v. Gwydir*, March 8, 1826, - - - II. 52.
4. A lease was granted to three tenants, excluding assignees, and two of the tenants, without consent of the landlord, assigned their interests to the other tenant, who obtained possession, and was thereafter deprived of it;—Held (affirming the judgment of the Court of Session) that he was not entitled to maintain an action against the landlord demanding repossession, as being the only person entitled to possession. *Taylor v. Fairlie and Taylor*, May, 5, 1826, - - - II. 101.
5. Held (reversing the judgment of the Court of Session) that a clause in articles and conditions relative to a lease regulating the management of a farm, bearing, that “the whole fodder to be “used upon the ground, and none sold or carried away at any

IN THE SEVEN VOLUMES.

LEASE—*continued.*

- “ time, hay only excepted, and all the dung to be laid on the farm the last year of the lease,” created an effectual prohibition against the tenant disposing or carrying off the farm any part of the straw of the way-going crop. *Gordon v. Robertson and others*, May 19, 1826, (see *infra*, 9.) - II. 115.
6. A lease of all the coals within certain lands was granted, without any stipulation as to leaving a barrier between them and the coal of adjoining lands; and power was given to the tenants to erect engines on pits, to draw the water from the coal on any of the adjoining lands of which the tenants might happen to be proprietors or lessees; and the tenants worked out the whole of the coal, whereby the water in the adjoining lands descended into and drowned the coal field so let to them; and an action was brought, after the lapse of twenty years from the termination of the lease, concluding that the tenant should be ordained to draw off the water, and erect a barrier, failing which, to pay damages:—Held (affirming the judgment of the Court of Session), 1, that the tenants were not bound to leave a barrier; and, 2, that the alternative conclusion for damages did not render a remit to the Jury Court imperative. *Craufurd v. Dixon, &c.*, May 23, 1826, - II. 354.
7. Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant of a sheep farm, who had given up to the landlord a part of it intended for winter pasture, was entitled to keep possession of another farm for that purpose, of which he had obtained possession as a subtenant of a party who was removed. *M'Donell v. Cameron and others*, May 13, 1827, - - - - - II. 592.
8. A landlord raised a process of sequestration against a tenant, and the sheriff found a certain sum of rent due, for which he decerned, and another, for which, if not paid, warrant of sale would be issued; but no final judgment having been pronounced, the tenant brought a process of advocacion ob contingentiam of a declarator which he had raised, but not executed; and the Court of Session advocated the cause, “sustained the reasons of advocacion, and assoilzied from the conclusions of the process;” and the landlord contended in the House of Lords, that as the only “reason of advocacion” was the alleged contingency with the declarator, and as no such action had then been in Court, the advocacion ought to be dismissed;—The House of Lords affirmed the judgment of the Court of Session in so far it advocated the cause, sustained the reasons of advocacion, and assoilzied from the conclusions of the process; but remitted, with instructions to remit to the sheriff to proceed in terms of his interlocutor. *M'Donell v. Cameron and others*, June 13, 1827, - - - - - II. 595.
9. A landlord drew up certain “articles and conditions” for letting his estate, by which, inter alia, it was stipulated, that “the whole fodder is to be used upon the ground, and none sold or carried awaay at any time, hay only excepted, and all the

## GENERAL INDEX OF MATTERS

### LEASE—*continued.*

- “dung to be laid on the farm the last year of the lease;” and a tenant took a farm by a missive, binding himself to the conditions in another tenant’s missive, which referred to these articles, and he signed a draft of a tack referring to them, but the draft was never extended, and he did not sign the articles themselves, but possessed for the full endurance of the lease:—Held (affirming the judgment of the Court of Session), 1, that the tenant was bound by the “articles and conditions;” but (reversing the judgment), 2, that in conformity to the reversal in the case of Gordon against Robertson and others, May 10, 1826, he was not entitled to carry away the fodder of the last year. Gordon v. Anderson, Feb. 15, 1828, (see *supra*, 5,) III. 1.
10. Circumstances under which it was held, *ex parte*, (reversing the judgment of the Court of Session,) that an assignation of a building lease by a father to his sons was not collusive, and therefore sustained in a question with a creditor of the father. Malcolms v. Young, June 5, 1829, - - - III. 404.
11. A way-going tenant, whose ish was from the houses and grass at Whitsunday, and from the arable land at the separation of the crop from the ground, and who was bound to consume on the farm the whole fodder, except hay and the fodder of the last crop, and undertook sufficiently to cultivate, labour, and manure the land,—Found entitled (affirming the judgment of the Court of Session) to the value of the straw remaining on the farm at the way-going Whitsunday (not amounting to more than necessary for the purposes of the farm until the possession expired), and to the dung made since last wheat seed-time; it having been the tenant’s unchallenged practice, and agreeable to the received rules of good husbandry in the district, to preserve the manure for the wheat crop. Allen v. Berry, June 10, 1829, - III. 417.
12. On a question of fact relative to a tenant’s liability for a year’s rent, The House of Lords (affirming the judgment of the Court of Session) held the tenant not to be liable. Thomson v. Forrester, June 18, 1830, - - - IV. 136.
13. Held (affirming the judgment of the Court of Session), 1, that a bonâ fide purchaser from a tenant of part of his crop, which has been delivered and paid for, is liable in second payment to the landlord where the rent of that crop has not been paid; and, 2, that the purchaser is not protected, although the contract of sale be made by sample in public market. Dunlop and Co. v. Dalhousie, Dec. 7, 1830, - - - IV. 420.
14. Circumstances in which it was found (affirming the judgment of the Court of Session) that a party had acquired no real right to a farm under an improbativè lease. Pentland v. Murray, &c., Feb. 15, 1831, - - - V. 28.
15. Held (affirming the judgment of the Court of Session) that it is competent for a landlord to insist in an action of maills and duties, and a process of sequestration, against a tenant, at one and the same time. Pentland v. Booth, March 31, 1831, V. 228.

IN THE SEVEN VOLUMES.

LEASE—*continued.*

16. Held (affirming the judgment of the Court of Session) that a tenant under a written lease must give notice forty days before Whitsunday of his intention to remove, otherwise he will be held to continue in possession by tacit relocation. *M'Intyre v. M'Nab's Trustees*, July 8, 1831, - - - V. 299.
  17. Circumstances in which it was held (affirming the judgment of the Court of Session) that a tenant was not entitled to a stipulated deduction of rent in respect of not being provided with a road in terms of his lease, a road equally good being enjoyed by him. *Burns and Grier v. Stewart*, July 27, 1831, - V. 356.
  18. Tack was granted to a tenant, "his heirs, assignees, and sub-tenants," with warrandice to him and "his foresaid;" the tenant granted a sub-tack with a clause of warrandice, but did not assign the warrandice in the tack; and the tack was reduced as ultra vires of the granter, and the sub-tenant thereupon removed:—Held (reversing the judgment of the Court of Session) that the sub-tenant had no title to sue a direct action of damages founded on the warrandice in the tack against the landlord. *Executors of William Duke of Queensberry v. Mackill Maxwell*, Oct. 12, 1831, - - - - - V. 771.
  19. It was provided by a lease that a tenant should not take two white crops, or plough up for crop any part of the farm which had not been three years in grass, and if he deviated from this rotation, he should pay 10*l.* of additional rent for each acre so cropped for the last three years of the lease; and in the penult year of his lease he cropped a field which had not been three years in grass, and also cropped the same field in the last year of the lease:—Held (affirming the judgment of the Court of Session) that the tenant was liable in the additional rent for both years. *Lawson v. Ogilvy*, July 8, 1834, - - - VII. 397.
  20. A landlord and tenant entered into missives of lease, in which the rent was fixed at a half boll of wheat, three firlots of barley, and six pecks of oats for each Scotch acre, payable by the fiars prices; but the proportions were not expressed which these measures bore to the imperial standard measure; and the landlord, under whose direction the missive of lease had been framed, raised an action, after the tenant had entered into possession, to reduce the lease, libelling upon the act 5 Geo. IV. c. 74., ordaining uniformity of weights and measures:—Held (affirming the judgment of the Court of Session) that the act did not apply to the case. Question, Whether under the above circumstances the landlord was barred from founding on the statute? *Henry v. M'Ewan*, August 9, 1834, - - - VII. 411.
- See *Arbitration*, 4.—*Assignment*, 2.—*Bankruptcy*, 18.—*Bona et Mala Fides*, 2. 3.—*Cautioner*, 5.—*Entail*, 9. 13. 17.—*Partnership*, 14.—*Right in Security*, 1.

LEGACY. See *Testament*.

LEGITIM. See *Testament*, 10.

LIEN. See *Retention*.



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LIFERENT. See *Fee and Liferent*.

LITERARY PROPERTY. See *Exclusive Privilege*, 1.

LOAN. See *Insurance*, 3.—*Oath*, 1.

LOCUS PŒNITENTIÆ.

A father by missive letter sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenary, and of his sons nominatim in fee; and he caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser's hands for eight years certain;—Held (affirming the judgment of the Court of Session), in a question between the father and the creditors of the sons, that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons. *Spence v. Ross*, March 25, 1829, - - - III. 380.

See *Testament*, 10.

MANSE. See *Church*, 3.

MARRIAGE. See *Husband and Wife*, 1. 2. 3.

MARRIAGE CONTRACT. See *Husband and Wife*, 4.

MASTER AND SERVANT.

1. Circumstances under which (affirming the judgment of the Court of Session) a master, against whom an interdict had been granted, was held not answerable for a breach of it committed by his servant. *Duke of Roxburghe v. Waldie*, Feb. 10, 1825, - I. 1.
2. A hedger and ditcher in the employment of a Scottish nobleman on his estates in England entered into a written agreement to serve him in that capacity on his estates in Scotland, at the same wages as those who were formerly employed in the same capacity on these estates had received; and the nobleman farther stated, "In addition to these, as an encouragement for his greater assiduity, Lord M. is to make him a present of 20*l.*;" and the party so hired served for several years:—Held (affirming the judgment of the Court of Session) that under all the circumstances the addition of 20*l.* was not limited to the first year of service.—Bank interest allowed on the arrears of the 20*l.* for nineteen years. *Earl of Mansfield v. Scott*, Feb. 18, 1833. - - - - - VI. 277.

See *Obligation*, 4.—*Prescription, Triennial*, 2.

MEDITATIO FUGÆ. See *Arrestment in Meditatione Fugæ*.

MEMBER OF PARLIAMENT. See *Sasine*, 1.

MINOR.

1. A minor in trade gave a receipt for 3,000*l.* sterling, but which was not a trade transaction; and having been found liable in repetition for the whole amount, although he alleged that truly he had not received 3,000*l.* sterling, but only certain items and orders, some of which had been paid, and others not;—The House of Lords (reversing the judgment of the Court of Session, except as to an admitted sum) ordered an inquiry as to the amount de facto received, or what might, without the party's

## IN THE SEVEN VOLUMES.

### MINOR—*continued.*

- wilful default, have been received, in respect of the receipt. Crawford v. Bennet, June 19, 1827, - - II. 608.
2. Held (affirming the judgment of the Court of Session), 1, that a discharge of an heritable bond by tutors after the expiration of the tutory is not valid; and, 2, that the tutors granting such a discharge are liable to repay the amount of the bond to the party to whom they had granted the discharge, and against whom the bond has been revived. Ross, &c. v. Lockharts, &c., June 24, 1829, - - III. 481.
3. A gift of tutory dative was made in favour of three persons, without the specification of any quorum, or provision in favour of survivors; and the tutors appointed one of their number to be their factor, for whose intromissions a party became cautioner; and thereafter one of the tutors died:—Held (reversing the judgment of the Court of Session), that the office of tutory terminated by the death of the tutor, that consequently the factory came to an end, and that the cautioner thenceforth was free from his obligation. Scot v. Stewart, April 7, 1834, - VII. 211.  
See *Entail*, 22.—*Testament*, 11.

MORA. See *Interest*, 3.

MORTIFICATION. See *Testament*, 1. 3.

MUTUAL CONTRACT. See *Obligation*, 6.

### NUISANCE.

Found (affirming the judgment of the Court of Session) that it is competent to grant interim interdict prospectively against boiling whale blubber in the neighbourhood of a burgh. Burntisland Whale Co., &c. v. Trotter, &c., Oct. 1, 1831, - V. 649.

### OATH.

1. Under a reference to the oath of party, whether a certain sum of money had been advanced in loan,—Found (affirming the judgment of the Court of Session) that the oath did not prove that the money had been advanced in loan, and therefore the defender was entitled to absolvitor. Hamilton v. Lindsay's Trustees, March 8, 1825, - - I. 35.
2. The Court of Session having found that a reference to the oath of the drawer of a bill was incompetent, in respect that he had been convicted of a crime inferring infamia juris,—The House of Lords found it unnecessary to pronounce any judgment on that question, but that under the circumstances the reference had been properly rejected. Ritchie v. Mackay, June 24, 1829, III. 484.  
See *Bill of Exchange*, 2.—*Prescription*, *Triennial*, 1.

### OATH OF CALUMNY.

A party raised an action on a bond granted to his father in 1782 for the principal sum, and interest from that date; and the defenders alleged that the whole interest had been paid, but being unable to produce stamped receipts for it prior to 1818, required the party to emit an oath of calumny, and he declined to depone that he believed the interest was due, but merely

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### OATH OF CALUMNY—*continued.*

swore that money to the extent sued for was due; and the defenders having paid the principal sum:—Held (affirming the judgment of the Court of Session), 1, that they were entitled to be assoilzied; and, 2, question raised, but not decided, as to the effect to be given to unstamped receipts. *Duguid v. Mitchells*, May 25, 1825, - - - I. 203.

### OBLIGATION.

1. A lady, after the death of her husband, voluntarily offered to assign, for behoof of his creditors, the surplus rents of her estate, after allotting a certain part of them to her own use; and having calculated that thereby, and with other means, the debts would be paid in five years, she granted an obligation and assignation, conveying her rents to commissioners for that purpose, but without restricting the period to five years:—Held (reversing the judgment of the Court of Session) that the creditors were entitled to the surplus rents till their debts were paid. *Rundell, Bridge, and Rundell, and others v. Lady Montgomerie and Husband*, April 15, 1825, - - - I. 112.\*
2. Certain parties having agreed to defray the expenses of a prosecution at the instance of a procurator fiscal, and taken active measures in support of it; and having alleged, that in the course of the proceedings they had disclaimed them; and the procurator fiscal having been subjected in expenses and damages on account of the prosecution; and the Court of Session having found him entitled to relief;—The House of Lords so far affirmed the judgment as found him entitled to relief, but remitted to hear farther as to the amount of the expenses and damages, and as to the liability of the parties subsequent to the date of the alleged disclaimer. *Cooper and Co. v. Meek's Trustee*, May 31, 1825, I. 232.
3. Ship-builders agreed to repair and lengthen a whale ship at a certain rate of wages, and to make use of English oak; during the currency of the operations, the rate of wages of carpenters was, under the authority of the justices of the peace, increased; and the ship-builders made use of American instead of English oak; and the ship having been delivered as complete, was thereupon sent to the whale fishing at Davis's Straits, but, in consequence of the deficiency of the work, was obliged to return to port, and was there detained for twenty-two days undergoing repairs, and so lost the proper season for the Straits, and was sent to Greenland:—Held (affirming the judgment of the Court of Session), 1, that the ship-builders could not charge a higher rate of wages than that agreed on; 2, that although American oak at the time was as expensive as English, and was then considered equally good, yet, as it was not so good, the ship-builders were responsible for the loss thereby sustained; 3, that they were liable for the expense of the repairs, and of the wages, &c. of the seamen, incurred after the vessel was brought back from the voyage to Davis's

\* And see Vol. V. p. 201.

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### OBLIGATION—*continued.*

- Straits; 4, that they were also liable for any loss suffered by the vessel not being able to go to Davis's Straits, or to reach Greenland at the proper fishing season; and, 5, that although the ship-builders were partly successful in the litigation, yet, as the ship owners prevailed in regard to their counter claims, they were entitled to expenses. *Strachan and Gavin v. Paton, &c.*, Feb. 22, 1828, - - - - - III. 19.
4. Held (affirming the judgment of the Court of Session) that a road contractor is liable for the wages of workmen hired by a person acting ostensibly as his overseer, but who, it was alleged, was a sub-contractor; there being no satisfactory evidence that he was known in this character to the workmen. *M'Phail v. Glennie*, May 11, 1829, - - - - - III. 389.
5. Where it was stipulated in the contract of a banking company that the manager should be removeable by two thirds of the joint committee of management, Held (affirming the judgment of the Court of Session), 1, that the company were entitled, by a resolution of two thirds of the committee, to remove a manager who was named and appointed in the contract; and, 2, (reversing the judgment) that the company were not bound to show proper cause for having done so, or liable in damages if they could not do so. *Commercial Bank v. Pollock's Trustees*, June 12, 1829, - - - - - III. 430.
6. Construction of letters constituting a mutual contract between merchants. *Guthrie and others v. Anderson and others*, Feb. 18, 1830, - - - - - IV. 20.
7. Question raised, whether a commercial transaction between parties in Great Britain and America pending war, or on the eve of war between these countries, was *pactum illicitum*? *M'Gavin v. Stewart*, July 14, 1830, - - - - - IV. 184.
8. Circumstances in which it was held (affirming the judgment of the Court below) that an obligation to pay a debt was not founded on such error as was sufficient to set it aside. *Grieve v. Wilson*, August 19, 1833, - - - - - VI. 543.
9. Circumstances in which held (affirming the judgment of the Court of Session) that a party who had granted an obligation to discharge a bond, and received part of the money, was relieved from implement of it on restoring the money. *Miller and others v. Anderson*, August 27, 1833, - - - - - VII. 12.
- See *Bank.—Interest, 2.—Partnership, 1. 2. 3.—Stamp, 1.—Writ, 3.*

**PACTUM ILLICITUM.** See *Obligation, 7.—Partnership, 12.*

### PARENT AND CHILD.

A Scotchman by birth, who was heir of entail in possession, and proprietor of estates in Scotland, and who had settled in early life in England, making occasional visits to Scotland, had, by an illicit connexion with an Englishwoman, a son born to him in England, and he afterwards came to Scotland with the child and mother, where, after a residence of fifteen days, he married her; and they remained in Scotland about two months, visited his estates, and

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### PARENT AND CHILD—*continued.*

returned to England with the child, where they remained until his death:—Found (reversing the judgment of the Court of Session) that the child was not entitled to the benefit of legitimation by the subsequent marriage of his parents. *Rose v. Ross*, July 16, 1830, - - - - - IV. 289.

See *Testament*, 10.

PARISH. See *Church*, 4.

### PARTNERSHIP.

1. Circumstances under which it was held (reversing the judgment of the Court of Session) that a partner in a joint adventure (the terms of which were arranged by a written contract) had no right to recompense for personal trouble connected with the adventure, for which no stipulation had been made, but which it was alleged was *casus improvisus*; nor to indemnity for the adventure having been put an end to as ruinous. *Campbell, Rivers, and Co. and others v. Beath*, March 3, 1826, II. 25.
2. Circumstances in which it was held (affirming the judgment of the Court of Session) that certain shipments of goods to the Continent of Europe, during the war between France and Britain, made by an individual partner of a company, who was a citizen of America, belonged to him exclusively, and that his partner, who was a subject of Britain, had no claim to them, in consequence of letters written by him disclaiming all connexion with the goods, although he alleged that these letters were written to deceive the enemy. *Buchanan v. Morrice and others*, May 19, 1826, - - - - - II. 143.
3. Circumstances in which it was held *ex parte* (reversing the judgment of the Court of Session) that the extent of the interest of a partner in a company, where this was not fixed by contract, was not to be regulated by the amount of his input stock, as compared with that of the other partners, but that he was to be held as having an equal share. *Struthers and others v. Barr*, May 19, 1826, - - - - - II. 153.
4. Circumstances in which it was held (reversing the judgment of the Court of Session) that a question, whether a company had been dissolved and goods sold to a partner or not should be submitted to a jury, and the parties examined before the Jury Court, notwithstanding that the dissolution had been publicly advertised, and the invoices and bills of lading set forth that the goods were the property of the partner. *McGavin v. Stewart*, July 14, 1830, - - - - - IV. 184.
5. Held (reversing the judgment of the Court of Session) that when there is no conclusive written evidence fixing the proportion of profits to be drawn by partners, the question is one for a jury; and a remit made to try an issue accordingly. *Thomson v. Campbell's Trustees*, Feb. 14, 1831, - - - - - V. 16.
6. What facts and circumstances held (affirming the judgment of the Court of Session) sufficient to establish that a party was a partner of a trading company. *Gillon v. Mackinlay, &c.*, Sept. 22, 1831, - - - - - V. 468.

## IN THE SEVEN VOLUMES.

### PARTNERSHIP—*continued.*

7. Held (reversing the judgment of the Court of Session) that calling up payment of instalments on shares subscribed for in a joint stock company did not fall under "ordinary business," and could not be effectually done by a quorum of the committee of management entrusted with the ordinary business of the company. *Clyne v. Sclater, &c.*, Sept. 29, 1831, - - - V. 625.
8. Two individuals having entered into a joint speculation in the purchase of an estate,—Held (affirming the judgment of the Court of Session), 1, that neither party was liable in damages for the manner in which this joint adventure was conducted; 2, that, notwithstanding a change of circumstances, the eighth article of their contract of copartnership remained binding; 3, that one of the parties was prevented from objecting to an accountant's report, and was not entitled to factors fee; and, 4, that it was not usurious for the parties to stipulate that interest should be allowed by the one to the other out of the clear rents and profits of the estate, including the making a rest at the end of the year. *Hunter v. Cochrane, &c.*, Sept. 30, 1831, - - - V. 639.
9. Three separate contracts having been entered into by copartners in the course of five years,—Held that the last contract was to be explained by the first; but observed, that a recital in a deed is not operative, unless for the purpose of explaining what is doubtful; that under the contracts one of the partners was entitled to a share of profits against his copartners personally, and not merely out of the reversion of the company estates; and that he was not liable in a loss in a question with his copartners. *J. Mackenzie's Trustees v. A. Mackenzie's Trustees*, Oct. 15, 1831, - - - V. 796.
10. By the contract of copartnership entered into on the formation of a shipping company, it was provided that "the free profits" of the company, as they shall appear at the time of each annual balance, shall be divided among the partners in proportion to their several shares in the concern, under a provision that in fixing the amount, 25 per cent. of the free profits as appearing at the balance, shall be set apart as a sinking fund for upholding the number of vessels necessary for carrying on the company's trade and meeting risks, with this qualification, that if the said sinking fund shall at any time exceed 5,000*l.* no part of the profits thereafter shall be set aside so long as it remains at that amount. The directors on striking the annual balance, previously to setting apart the sinking fund and ascertaining the net profits, made a deduction from the gross receipts, and brought it to the credit of the different vessels, on account of their deterioration within the past year. One of the parties having challenged this mode of reaching the amount of the free profits,—The House of Lords affirmed the judgment of the Court of Session, assailing the defenders. *Flowerdew v. The Dundee Shipping Company*, August 11, 1832, - - - VI. 160.
11. The partners of a company having died, one intestate, and the last survivor having left a settlement, appointing trustees and executors, and the trustees and executors having accepted:—

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### PARTNERSHIP—*continued.*

- Held (affirming the judgment of the Court of Session) that the representatives of the intestate partner were entitled to have the property sequestrated, and a judicial factor appointed. *Dixon and another v. Dixon and others*, August 13, 1832, VI. 229.
12. A secret agreement was entered into between a law agent in the country and a person who was about to practise before the Supreme Court, by which the former, in consideration of his advancing money for the business, stipulated that he should receive one third of the profits:—Held (affirming the judgment of the Court of Session) that such an agreement was *pactum illicitum*. *Gilfillan v. Henderson*, July 12, 1833, VI. 489.
13. A partner of a joint stock company assigned to bankers certain shares of the company *ex facie* absolutely, and they intimated the assignation to the company:—Held, in a question with the company (affirming the judgment of the Court of Session) that the bankers, as assignees, were liable as partners; and that it was not relevant to free them from this liability to allege that the assignation was granted in security of payment of debt, and that certain forms prescribed by the contract of partnership as to transferring shares had not been observed. *Allan and Son v. Turnbull*, April 8, 1834, - - - VII. 281.
14. One of the two partners of a company let to the company a mill, with the large machinery fixed therein, and assigned the small machinery to the company, the value being to be placed at his credit in their books; he thereafter died in debt to the company; the mill with its appurtenances was sold; and the full rent stipulated in the lease for the buildings and machinery was paid by the surviving partner, who by the lease was allowed to continue lessee, and take the small machinery; and this partner became bankrupt:—Held (affirming the judgment of the Court of Session) that the trustee on his sequestrated estate was not entitled to appropriate the large machinery as company estate, and to obtain repetition of the rent paid since the death of the other partner, in so far as might effeir to this machinery. *Cox and Paterson v. Steads*, August 15, 1834, - - VII. 497.
15. Circumstances under which it was held (affirming the judgment of the Court of Session), 1, that the share of a partner in a joint stock company had been transferred to an assignee, although the deed of assignation was not produced; and, 2, that the company, by their conduct, had waived a stipulation in the contract that all transfers should be made in a particular form and manner. *Drummond v. Thomson's Trustees*, August 15, 1834. VII. 564.
16. Circumstances in which it was held (affirming the judgment of the Court of Session) that the pursuers of an action of relief *inter socios* of debts, for which a separate action had been brought against the company, were not entitled to insist in the action of relief to a greater extent than the conclusions in the principal action. *Martin and others v. Thomson's Trustees*, August 15, 1834, - - - VII. 574.
- See *Agent and Principal*, 1.—*Assignment*, 2.—*Process*, 5.—*Proof*, 1.—*Title to Pursue*, 5. 6.

## IN THE SEVEN VOLUMES.

### PASSIVE TITLE.

A testator by a deed of settlement conveyed his property and effects to a party, who was not the heir at law, under burden of payment of legacies; and the heir at law (who was the disponent's mother) made up titles to the testator, and thereafter executed a gratuitous disposition in favour of the disponent, who in the meantime had intromitted with the funds of the testator;—Held (affirming the judgment of the Court of Session) that the disponent was liable in payment of the legacies, although he alleged that his right was derived from the heir at law, and not from the testator. *Wyllie v. Ross and others*, June 12, 1827, - - - - - II. 576.

See *Adjudication*.

PATRONAGE. See *Church*, 5. 6.

### PAYMENT.

1. A creditor having drawn a dividend from the sequestrated estate of his debtor upon the sum total of a debt payable by four instalments, of which the two last were not yet due;—Held (reversing the judgment of the Court of Session) that the dividend was not imputable towards the total extinction of the first and second instalments, but was to be considered as a payment of so much on each pound of the whole debt. *Balmanno v. M'Nee*, Feb. 24, 1826, - - - - - II. 7.
2. Circumstances in which it was held, affirming the judgment of the Court of Session, that the interest on a bond was paid; that one bill was prescribed, and another retired; and that the trustees of a party, alleged, but not proved, to have purchased pictures, were entitled to return them to the seller. But the interlocutor of the Court below was altered in part as to costs. *Hunter v. Duff and others*, August 11, 1832, - VI. 206.
3. Circumstances under which payment was presumed from lapse of time. *Macdougall v. Campbell and others*, August 27, 1833, - - - - - VII. 19.

See *Cautioner*, 3.—*Presumption*, 1.

PAYMENT, INDEFINITE. See *Payment*, 1.

PEERAGE. See *Exhibition*.

PENAL RENT. See *Lease*, 3.

### PERSONAL OBJECTION.

1. Circumstances under which (affirming the judgment of the Court of Session) a party was held barred from reducing certain deeds made in contravention of an entail. *Cunninghame v. Cunninghame and Trustees*, April 15, 1825, - - - I. 103.
2. Circumstances under which it was held (reversing the judgment of the Court of Session) that a party making use of a right which he only had under documents challenged by him, to the effect of having them reduced, was barred from insisting that they should



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### PERSONAL OBJECTION—*continued.*

be set aside. Magistrates of Montrose v. Mill, June 28, 1825, - - - - - I. 570.

See *Acquiescence*, 2.—*Cautioner*, 7.—*Entail*, 22.—*Husband and Wife*, 1.—*Lease*, 20.—*Repetition*, 1.—*Title to Pursue*, 4. 7. 8.

PERSONAL OBLIGATION. See *Husband and Wife*, 2.—*Reparation*, 8.

POINDING. See *King*, 1.

POINDING OF THE GROUND. See *Right in Security*, 2.

### POOR.

A pauper who was found guilty of theft before the Court of Justiciary, but insane at the time of committing it, having been ordained to be confined in jail, or delivered to his friends under the usual conditions, and having been sent by the magistrates of the burgh and the Commissioners of Supply of the county within which the jail lay to a lunatic asylum;—Held (reversing the judgment of the Court of Session) that the Officers of State were not liable for the expense of his maintenance in jail and the asylum down to the period when, having recovered sanity, he obtained a remission from the Crown. Officers of State v. Commissioners of Supply of Wigtonshire, March 10, 1830, IV. 43.

### POSSESSION.

Circumstances in which (affirming the judgment of the Court of Session) the presumption of property arising from possession was held to be overcome. Turner v. Gibb and Macdonald, July 7, 1830, - - - - - IV. 154.

### POSSESSORY JUDGMENT.

Two opposite heritors on the banks of a river having each right to one half of the salmon fishing, and having exercised it for more than seven years by one and the same tenant;—Held (affirming the judgment of the Court of Session) that a tenant who had so enjoyed that possession by virtue of a joint lease, was entitled to the benefit of a possessory judgment after the one heritor had let his one half share to another tenant. M'Kenzie v. Sutherland, May 19, 1826, - - - - - II. 158.

PRESBYTERY. See *Jurisdiction*, 4.

### PRESCRIPTION.

1. A fee simple proprietor in 1732 executed an entail of his estate to his son, and the heirs of the son's marriage, and other substitutes, reserving power, with consent of his son, to alter, except as to the heirs of the marriage, on which infestment was not taken; in 1741, with his son's consent, he executed a disposition of the estate, without fetters, on which sasine was taken; and cancelled the entail; and one of the heirs of the marriage afterwards, by a decree of proving the tenor, revived the entail, on which infestment was taken in 1768; and the heirs of the marriage became extinct in 1797; and a party who was entitled to succeed, both under the entail and the unfettered disposition, in ignorance of the latter,

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### PRESCRIPTION—*continued.*

made up titles under the entail, and there had been a possession for a period exceeding forty years from the date of the infestment in 1768:—Held (affirming the judgment of the Court of Session) that, having two titles, he was entitled to impute his possession to the unfettered disposition, and that the entail was not rendered effectual against the estate by prescription. *Mackay v. Lord Reay*, June 7, 1825, - I. 306.

2. Question raised, but remitted for reconsideration, whether a party had a sufficient title and possession to acquire a prescriptive right to coal? *Forbes and Tutors v. Livingstone and Tutor*, June 29, 1825, - - - I. 657.

3. A proprietor of heritable subjects granted an *ex facie* absolute disposition, on which infestment was taken, qualified by a back bond containing a power of redemption within eleven years; he assigned this bond to a third party, and disposed the property to him; and the assignee, within the eleven years, raised an action of redemption, which fell asleep; and the heir of the original disponee acquired right to the assignation and relative action, which he afterwards wakened:—Held, in an action of reduction on fraud and incapacity, (affirming the judgment of the Court of Session,) that although more than forty years had elapsed from the date of the above deeds, yet a prescriptive title had not been obtained, so as to exclude a challenge by the heir. *Hume, &c. v. Duncan*, Feb. 18, 1831, - - - V. 43.

See *Church*, 2. 5.—*Entail*, 5. 20.—*King*, 2.—*Road*.

### PRESCRIPTION, SEPTENNIAL.

A creditor holding a bond from two individuals, both bound as principal co-obligants, although one was known to be merely cautioner, accepted a composition, and discharged the principal, reserving recourse against the cautioner; and more than seven years having elapsed from its date before action was raised:—Held (affirming the judgment of the Court of Session), 1, that the act 1695 did not apply; and, 2, that, as the reservation was of a qualified and conditional nature, (viz. that the discharge should not be effectual to the principal in case the cautioner should thereby be liberated,) the cautioner was liable for the balance. *Smyth v. Ogilvies*, June 7, 1825, - - - I. 315.

See *Cautioner*, 7. 8.

PRESCRIPTION, SEXENNIAL. See *Payment*, 2.

### PRESCRIPTION, TRIENNIAL.

1. Held (affirming the judgment of the Court of Session) that a party having on a reference to oath deponed that he believed a prescribed account had been paid by his factor, and was certain it was paid—from having settled accounts with him; and these accounts not showing such payment, this was sufficient to elide the triennial prescription. *Cooper v. Hamilton*, March 14, 1826, - - - II. 59.

2. Held (affirming the judgment of the Court of Session) that the triennial prescription applies to the wages of a servant. *Ques-*

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### PRESCRIPTION, TRIENNIAL—*continued.*

tion, Whether that prescription applies to the purchase of cows singly, and forming part of an account current? *Macdougall v. Campbell and others*, August 27, 1833, - VII. 19.  
See *Payment*, 3.

PRESCRIPTION, VICENNIAL. See *Entail*, 3. (4.)

### PRESUMPTION.

1. Held (affirming the judgment of the Court of Session) that, in the circumstances of the case, two promissory notes, although found in the possession of the debtor, were to be regarded as renewals of unretired bills, and not payments. *Brown v. Paterson's Trustees*, March 25, 1830, - - - IV. 57.
2. Circumstances under which a gratuitous bond of annuity, granted by one brother to another, during the joint lives of the parties, found in the custody of a person who was the ordinary agent of the granter, and had also acted as agent for the grantee, was held (affirming the judgment of the Court of Session) to be a delivered deed. *Maule v. Ramsay*, March 25, 1830, IV. 58.
3. Circumstances under which it was held (affirming the judgment of the Court of Session) that a bond which had been destroyed was to be presumed unconditional. *Bute v. Cooper*, Nov. 17, 1830, - - - - - IV. 335.  
See *Possession.—Payment*, 3.—*Road*.

PRINCIPAL AND AGENT. See *Agent and Principal*.

PRISONER. See *Cessio Bonorum*.

### PROCESS.

1. Incompetent for the Court below to amend an interlocutor after an appeal entered. I. 215. Note.
2. Found (affirming the judgment of the Court of Session) that the Court of Session have, on good cause shown, power to recall letters of advocacy after they have been signetted. *Brown and Curator v. Bogle and Husband*, June 8, 1825, - I. 318.
3. A party who had an opportunity of being heard at the bar of the House of Lords on points incidentally noticed in his printed case, and on which judgment was given, although he alleged he was not heard, is not entitled to a re-hearing. *Cathcart v. Earl of Cassillis and others*, May 31, 1825, - - - I. 239.
4. Appeal entertained, and costs awarded, on affirming the judgments complained of, where the interest of the appellant amounted to twenty-four shillings, and 30*l.* 5*s.* 8*d.* being expenses of process, and where doubts were entertained as to the soundness of part of the judgments, the appellant having limited his appeal to the part affirmed. *Cooper v. Hamilton*, March 14, 1826, - II. 59.
5. Held (affirming the judgment of the Court of Session) that a defender who was sued as the surviving partner of a company was not entitled to object that the representatives of a deceased partner were not called, seeing that he declined to state who or where they were. *M'Braire v. Hamiltons*, March 22, 1826, II. 66.
6. Held that a decree which awarded a sum of sterling money where

IN THE SEVEN VOLUMES.

PROCESS—*continued.*

- the summons concluded for Halifax currency, was quoad hoc ultra petita, and a remit made to correct it accordingly. *M'Braire v. Hamiltons*, March 22, 1826, - - - II. 66.
7. Respondents in an appeal, having failed to lodge answers to the petition of appeal, and also their cases, in due time; and the cause being appointed for hearing *ex parte*:—Held not entitled to be heard at the bar; but the case delayed on their paying the costs of the day. *Taylor v. Fairlie and Taylor*, May 5, 1826, - - - II. 104. Note.
8. Question raised and considered, as to what is the proper subject and shape of a bill of exceptions, and what amounts to a direction by the judge, or only an expression of opinion, or mere *obiter dictum*? *Duff v. Earl of Fife*, May 22, 1826, - - - II. 166.
9. A constituent member of a town council present at an election of magistrates having gone abroad; and a petition and complaint having thereafter, within the statutory period, been presented in his name; and it being alleged that he had granted no mandate authorizing this to be done, and no mandate having been produced;—Held (affirming the judgment of the Court of Session) that the complaint at his instance was incompetent. *Arbuckle v. Innes*, Feb. 22, 1827, - - - II. 528.
10. Argued, but not determined, whether the several interlocutors pronounced in the Courts below in a declarator of marriage, or where a second marriage had taken place, apparently regularly, and a family born, could have been deemed duly pronounced in proceedings to which the second husband and the children of the second marriage were not parties? *Jolly v. M'Gregor*, June 29, 1828, - - - III. 85.
11. An appendix not laid upon the table of the House cannot be alluded to from the bar; but the House may order it to be laid on the table, and then counsel may remark on it. *Jolly v. M'Gregor*, June 20, 1828, - - - III. 142. Note.
12. An appeal sustained in name of an unincorporated commercial banking company, and several of the individual partners, against a judgment of the Court of Session in a process in which they were defenders. *Commercial Banking Company v. Pollock's Trustees*, July 28, 1828, - - - III. 365.
13. It would seem that an appeal against an interlocutory judgment taken after the final decision of a cause, although the decree exhausting the cause is not appealed against, is competent. *Downe, &c. v. Pitcairn, &c.*, June 24, 1829, - - - III. 472.
14. An order to consign in the Royal Bank a disputed sum sustained. *Brown v. Paterson's Trustees*, March 25, 1830, IV. 57.
15. A charter not produced or founded on in the Court below not permitted to be referred to in the House of Lords. *Governors of Heriot's Hospital v. M'Donald*, April 7, 1830, - - - IV. 98.
16. Competent for the House of Lords, on an appeal against a judgment of the Court of Session disallowing an exception, to take the whole cause into consideration. *Allardice, &c. v. Robertson*, April 8, 1830, - - - IV. 102.

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### PROCESS—*continued.*

17. On a recommendation by the House of Lords, a question of disputed accounting for work done settled by amicable adjustment of parties, and the adjustment made the subject of the order and adjudication of the House. *Whitehead v. Rowat*, April 8, 1830, - - - - - IV. 121.
18. Held that where the Court of Session had, of consent of a creditor, found a debtor entitled to deduction of property tax from 1808 till 1813, and the creditor did not appeal, but the debtor appealed the whole cause, and the House of Lords found it deducible only from and after 1813, the debtor could not claim deduction from an earlier period than 1813. *Keble v. Graham's Trustees*, July 14, 1830, - - - - - IV. 166.
19. Where the Court of Session rejected the vote of a Judge who had not been present at a hearing in presence, but considered the subsequent written pleadings, and would not require the opinion and vote of a judge who declined in consequence of having been leading counsel for the pursuer;—The House of Lords affirmed the judgment. *Innes v. Executors of Alexander Duke of Gordon*, Nov. 10, 1830, - - - - - IV. 305.
20. Held (reversing the judgment of the Court of Session) that under the act of sederunt, 12th Nov. 1825, it is imperative to remit a petition and complaint against the judgment of a trustee on a bankrupt estate to the Lord Ordinary, where facts require to be investigated. *M'Taggart v. Jeffrey*, Nov. 24, 1830, IV. 361.
21. After an appeal had been entered against a judgment reducing an election of magistrates, and the parties (as was alleged) came to an understanding, for political reasons, to allow it to be heard *ex parte*, found competent for a burgess, although not a member of council, to be sisted and heard as respondent, but that a candidate as member of Parliament was not so entitled. *Magistrates of Dundee v. Lindsay*, March 17, 1831, - - - - - V. 152.
22. Held (affirming the judgment of the Court of Session) that where an issue was sent to a jury as to whether a dam dyke was "to the injury and damage of the pursuers," as proprietors of salmon fishings in a river, it was not competent for the judge to direct the jury, that the question put in issue, and the only question which they were to consider, was, whether it was injurious in the actual condition of the river, and with reference to the existence of the dykes in the river. Observed, that it is incompetent to construe the issues by referring to the previous pleadings. *Leys, Masson, &c. v. Forbes, &c.*, Sept. 7, 1831, - - - - - V. 384.
23. A person raised an action against tradesmen employed by him to furnish pipes for supplying his house with water, concluding for repayment of the sums paid to account of the price, and for damages in respect of the insufficiency of the work:—Held (reversing the judgment of the Court of Session) that having stated the facts on which he founded in his summons and condescendence, which the defenders fully and explicitly answered, it was too late thereafter to deny the relevancy of the facts condescended on; and the case remitted to the Court of Session, with instructions

IN THE SEVEN VOLUMES.

PROCESS—*continued.*

- to direct an issue to be framed to try the question. M'Donald v. Mackie and Co., Sept. 21, 1831, - - V. 462.
24. Observations on the mode of pleading in the Scotch Courts. Gillon v. Mackinlay, &c., Sept. 22, 1831, - - V. 468.
25. Objections in a process of cessio,—that the certificate of imprisonment only bore from the 14th of one month to the 14th of another, but did not state if the pursuer had remained in prison in the interval; that all the creditors had not been called; and that the pursuer had from time to time varied the amount of his debts;—repelled (affirming the judgment of the Court of Session). Hunter v. Gardner, Sept. 28, 1831, - - V. 616.
26. Circumstances in which held (affirming the judgment of the Court below) that it is incompetent for the Court of Session to review an interlocutor of the Jury Court by suspension. Megget and Roy v. Douglas, Sept. 28, 1831, - - V. 622.
27. Order on an agent to exhibit the authority for putting the name of a counsel to an appeal case which was disclaimed by the counsel; and observations on alleged practice of doing so without authority. Grahame v. Grahame, Oct. 6, 1831, - V. 759.
28. An order for the examination of three parties before a jury discharged, in respect of two of them being dead. M'Gavin v. Stewart, Oct. 18, 1831, - - - - V. 807.
29. Held incompetent to have an appeal, previously disposed of, reheard, on the ground that an interlocutor in the cause had been omitted to be appealed from, and had not been allowed to be considered at the previous hearing. Scot v. Ker and another, August 11, 1832, - - - - VI. 214.
30. A party who had allowed the agent of his opponent to obtain decree in the Jury Court for expenses in his own name, found barred, (affirming the judgment of the Court of Session,) by the exception of competent and omitted from suspending a charge, on the allegation that the agent had no attorney licence for the period when the expenses were incurred. And observed that the case of Robertson v. Strachan, June 9, 1826, 4 Shaw and Dunlop, p. 772, was ill decided. Ewing v. Wallace, August 13, 1832, - - - - VI. 222.
31. Opinion intimated, that, where the pleadings in the Court below entitle a party to insist on an objection, the House of Lords are not barred from deciding the appeal upon that objection, although it may not have been pressed in the Court below, and although it form no part of the consideration of that Court in pronouncing the interlocutor appealed from. Luke v. Magistrates of Edinburgh, August 15, 1832, - - - - VI. 241.
32. Although a party found on a fact in his summons, yet if he do not do so in his condescence he cannot afterwards avail himself of it. Luke v. Magistrates of Edinburgh, August 15, 1832, - - - - VI. 241.
33. Observations on the form of preparing records. A supplementary action of reduction, having reference to a transaction falling under the act 1696, c. 5., but not libelling the act, and

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### PROCESS—*continued.*

- containing no reductive conclusions, dismissed as inept. *Blin-cow's Trustee v. Allan and Co.*, August 28, 1833, VII. 26.
34. Circumstances under which an appeal against an interlocutor, which was not a final judgment, and was pronounced unani-mously, and no leave to appeal had been obtained, was dis-missed as incompetent. *White's Trustee v. Wood's Trustees*, March 25, 1834, - - - VII. 147.
35. Question as to the competency of the Inner House in the Court of Session, in reviewing an interlocutor of a Lord Ordinary which does not exhaust the cause, pronouncing a new one which has that effect. *Hunter v. George's Trustees*, May 13, 1834, - - - VII. 333.
36. Held (affirming the judgment of the Court of Session) that a reclaiming note, praying to be reponed against a decree pro-nounced in respect of failure to lodge a revised condescendence, not being marked by the clerk as lodged within twenty-one days, was incompetent. *Fraser v. Gordon*, August 15, 1834, VII. 559.
37. Question, Whether an appeal against a unanimous judgment refusing to repon a party against a decree in absence, without leave to appeal, was competent. *Fraser v. Gordon*, August 15, 1834, - - - VII. 559.
- See *Bankruptcy*, 17.—*Husband and Wife*, 3.—*Lease*, 15.—*Part-nership*, 4. 5. 15.—*Ranking and Sale*.—*Teinds*, 1.—*Title to Pursue*, 4. 6.

### PROOF.

1. Held (affirming the judgment of the Court of Session) that pri-vate books of accounts kept by one partner, containing, among other entries, memoranda relative to company affairs, there being no evidence that the books had been seen by the other partner, could not be received as evidence against the repre-sentatives of the latter partner. *Smith v. Mitchell*, March 10, 1830, - - - IV. 47.
2. Incompetent to control the terms of a written contract by an extrinsic document. *Pentland v. Gwydyr*, Nov. 12, 1830, IV. 322.
3. Observed that hearsay evidence and parole testimony as to the contents of a letter not alleged to be destroyed ought to be struck out of a proof taken on commission. *Morton v. Hunters and Co.*, Nov. 26, 1830, - - - IV. 379.
4. In a reduction of a deed of settlement instituted by a party who had been served heir to the granter, he adduced a witness, who deponed that he considered himself a nearer heir than the pur-suer; that he had intimated to the defender his intention to challenge the deed, and although he did not obey a charge which he got to enter heir, he reserved his right to do so; that he believed he had not been served; that his mother was third cousin of the granter, and he was grandson of the daughter of the granter's ancestor, whose marriage he had not yet been able clearly to prove, although he had not yet made all the exertion in his power to do so; that he had nothing to do with the pre-

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### PROOF—*continued.*

sent case, but that, although he had not made up his mind to do it, he might challenge the deed, if he proved his propinquity; that he certainly did not withdraw his claim as heir at law, and had not renounced it in favour of the pursuer:—Held (reversing the judgment of the Court of Session) that he was a competent witness. *Ralston v. Rowat*, July 10, 1833, - VI. 468.

5. Question, Whether it be competent to found on the scroll of a deed as secondary evidence of its contents without first proving the execution of the deed.

See *Cautioner*, 6.—*Clause*, 4.—*Expenses*, 2.—*Foreign*, 3.—*Husband and Wife*, 2.—*Partnership*, 5. 6. 9.—*Process*, 22. 27.—*Testament*, 5.

### PROPERTY.

1. Held (affirming the judgment of the Court of Session) that statutory trustees, under a power to open quarries, had no right to enter to and take stones from a quarry open and worked prior to the statute. *Trustees of Stonehaven Harbour v. Keith*, April 2, 1831, - - - - - V. 234.
2. Circumstances under which a portrait of a late rector of the High School of Edinburgh, taken at the request and expense of an association of his pupils, and placed in the school-room, was, after his death, and on the removal of the school to a new building, held to be the property of the association, and not of his son and representative. *Clerk and others v. Adam*, July 16, 1832, VI. 141.
3. Three parties agreed that a canal or mill-lead should be made through their respective properties to propel machinery in works belonging to them, to be maintained at the expense of each, so far as it passed through his lands; but there was no express stipulation as to any right of access along the banks through their several properties:—Held (reversing the judgment of the Court of Session) that the proprietor of the ground on which the road was formed had right to prevent the others from using it, except in the case of obstruction in the water of the mill-lead or actual damage arising to their works. *Weir v. Glenny and others*, April 7, 1834, - - - - - VII. 244.
4. Question as to the rights of parties in mines and minerals where lands are held in run-rig. *Forbes v. Livingston*, July 8, 1834, - - - - - VII. 375.

See *Coal*.—*Fishing*.—*King*, 2.—*River*.—*Servitude*, 2.

### PROVING THE TENOR.

Circumstances in which a decree of the Court of Session, holding the tenor of a destroyed deed proved, was affirmed. *Rintoul v. Boyter*, June 27, 1833, - - - - - VI. 394.

See *Presumption*, 3.

PROVISIONS TO CHILDREN. See *Entail*, 21.—*Testament*, 10.

### PUBLIC BURDEN.

Found (affirming the judgment of the Court of Session) that under the statute 25 Geo. III. c. 28. the Magistrates of Edinburgh have right to levy impost duty from all vintners and tavern keepers within their bounds on all foreign wines and other liquors specified



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### PUBLIC BURDEN—*continued.*

in the act consumed within the taverns, whether the vintners themselves imported those liquors, or purchased them from other importers who had not paid the duty ; but that if the magistrates so levy the duty they cannot assess the tavern keepers in the commutation tax in respect of the taverns where the liquors are sold and consumed. *Budge and Co. and others v. Magistrates of Edinburgh*, June 13, 1827, - - - II. 588.

See *Ferry*.

### PUBLIC OFFICER.

1. Held *ex parte* (reversing the judgment of the Court of Session) that the right to receive the fees and emoluments of preparing charters, precepts of clare constat, and other feudal writs granted to or by the magistrates of Edinburgh, relative to subjects situated within the burgh of barony of South Leith, and of which the superiority had been acquired by the magistrates posterior to 1565, is not necessarily incident to the office of clerk of South Leith ; but although he had shown a *primâ facie* case of the right to draw them, yet it was competent for the town clerks of Edinburgh to prove either a direct authority given by the superiors to them to draw them, or such usage as necessarily inferred such authority. *Cunningham and Bell v. Veitch*, June 24, 1829, - - - III. 491.
  2. Circumstances under which the Court of Session having suspended a depute clerk of the peace, and prohibited him from exercising the duties or drawing the emoluments of the office for twelve months, found him liable in expenses, and ordained the deliverance to be inserted in the books of sederunt,—The House of Lords remitted to the Court to recall the interlocutor, except as to payment of the expenses, and ordered the party to pay the costs of appeal, declaring that the House awarded such costs in lieu of such suspension. *Campbell v. M'Farlane*, April 8, 1830, IV. 123.
  3. Question, Whether a party performing the duties of a public office in which he had been erroneously inducted was entitled to the emoluments? *Walker v. Craig*, August 29, 1833, VII. 82.
- See *Bona et Mala Fides*, 4.—*Reparation*, 4. 7.

### PUBLIC POLICE.

Held (reversing the judgment of the Court of Session) that a clause in the Police Act of Dumfries, authorizing the Commissioners to remove obstructions, did not warrant them, for the purpose of widening the entrance to a street, to remove a tenement which did not encroach on or obstruct the line of the other houses. *Newall, &c. v. Commissioners of Police of Dumfries*, June 21, 1830, - - - IV. 137.

### RANKING AND SALE.

Held (affirming the judgment of the Court of Session) competent to grant interim warrant on a judicial factor, for payment of a preferable annuity out of the arrested rents of lands, the subject of a ranking and sale, before any common agent was appointed, or a state of the debts made up, or a proof of rental taken. *White's Trustee v. Wood's Trustees*, March 25, 1834, V. II. 174.

IN THE SEVEN VOLUMES.

RECOMPENCE. See *Partnership*, 1.

REFERENCE TO OATH. See *Oath*.

RE-HEARING. See *Process*, 3.

RELIEF. See *Church*, 4.—*Heir and Executor*, 2.—*Reparation*, 8.

REMOVING. See *Lease*, 16.

REPARATION.

1. Circumstances under which it was held (affirming the judgment of the Court of Session) that a party was not entitled to damages for the alleged illegal execution of diligence. *Cooper v. Campbell and others*, April 18, 1825, - - - I. 131.
2. Held (affirming the judgment of the Court of Session) that a law agent is liable for loss arising from an heritable security being ineffectually completed, although drawn on the employment of the granter of the deed, and not of the lender of the money. *Lang v. Struthers and others*, May 28, 1827, - - - II. 563.
3. Held (affirming the judgment of the Court of Session) that superiors who had feued out ground for building to a considerable extent in streets, and constructed a common sewer or drain for the use of the streets, and long subsequent to the conveyance of the feus acknowledged dominion over the drain by stipulating with a third party to keep it in repair, were liable for damage occasioned by the disrepair of the drain. *Magistrates of Edinburgh and others v. Dicksons*, Feb. 17, 1830, - - - IV. 1.
4. Held (affirming the judgment of the Court of Session), 1, that a justice of peace is not protected against an action of damages for a verbal slander averred to have been made maliciously in delivering judgment against a party under trial before him; but, 2, Held (reversing the judgment) that the malice is not to be inferred from the words used, but must be proved. *Allardice, &c. v. Robertson*, April 8, 1830, - - - IV. 102.
5. Held (affirming the judgment of the Court of Session) that a law agent employed to prepare a security over a land estate having inserted an obligation in the bond to infest à me, and neglected to get it and the sasine confirmed, whereby the security became unavailing, was liable in reparation to the client. *Stevenson v. Rowand*, July 14, 1830, - - - IV. 177.
6. Certain judicial statements alleged to be slanderous held (reversing the judgment of the Court of Session) to be privileged, unless it was proved that the party using them did so from motives of malice, and did not believe them to be true; and a remit made to ascertain these facts by the verdict of a jury. *Ewing v. Cullen*, August 24, 1833, - - - VI. 566.
7. By statute 3 Geo. IV. c. 78. § 134. (*Edinburgh Police Act*), it is provided, that "no action shall be commenced against the judges, &c. for any thing done in the execution of this act in any case, unless wilful corruption or oppression, or culpable negligence, out of which real injury has arisen, be charged." In a summons of damages against a Judge of the Police Court, and others, on account of proceedings in the Police Court,

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### REPARATION—*continued.*

- issuing in the imprisonment of the pursuer, he averred that they were incompetent, malicious, wilfully oppressive, and unwarrantable; and in the condescence he stated facts which amounted to a charge of wilful corruption and oppression, out of which real injury arose:—Held (affirming the judgment of the Court of Session) that the summons and condescence were relevant, although the precise words of the statute were not used. *Stuart and others v. Kelly*, May 16, 1834, - VII. 343.
8. A minister who was wrongously interdicted by the heritors from selling trees off his glebe, and who had been subjected in damages and expenses to the buyer:—Held (affirming the judgment of the Court of Session) barred by a transaction from claiming relief against the heritors. *Craig v. Duke of Hamilton*, August 5, 1834, - VII. 483.
9. Circumstances under which it was found (affirming the judgment of the Court of Session) that tenants were not liable in damages to their landlord for a failure to use the fodder of the crop of the last year of their lease on the farm. *Gordon v. Anderson and others*, August 15, 1834, - VII. 545.
- See *Agent and Client*, 3. 4.—*Entail*, 12.—*Lease*, 2. 6.—*Master and Servant*, 1.—*Obligation*, 2. 3.—*Partnership*, 8.—*Process*, 23.—*Sale*, 7.—*Wreck*.

### REPETITION.

1. Held (reversing the judgment of the Court of Session), 1, that where a payment has been made in virtue of a decree in absence and diligence thereon, repetition cannot be ordered so long as the decree and diligence are not set aside; 2, that it is not relevant to entitle a party to repetition to allege that he has paid under a mistake in point of law; and, 3, that a party who has had the means of knowing the facts before making a payment, and seeks reparation on an allegation that he paid under a mistake in point of fact, may be barred from claiming repetition. *Wilson, &c. v. Sinclair*, Dec. 7, 1830, - IV. 398.
2. Is there by the law of Scotland a *condictio indebiti*, where the ignorance is not *facti* but *juris*? *Dixons v. Monkland Canal Company*, Sept. 17, 1831, - V. 445.
- See *Acquiescence*, 3.—*Condition*, 1.—*Entail*, 12.

### RES JUDICATA.

1. Circumstances in which it was held (reversing the judgment of the Court of Session) that a decree of the House of Lords did not form a *res judicata* as to a claim for certain leases; but affirming the judgment, *in hoc statu*, as to a claim to certain lands which had been found by an extracted decree to belong to the defender. *Maule v. Maule and Earl of Dalhousie*, May 26, 1826, - II. 451.
2. Circumstances in which it was held (affirming the judgment of the Court of Session) that a decree pronounced in reference to a question of English law, on the motion of the party challenging it, constituted *res judicata*, although he alleged that he had

## IN THE SEVEN VOLUMES.

### RES JUDICATA—*continued.*

acted under erroneous information as to the law of England.  
Macallister v. Macallister and others, June 23, 1830, IV. 142.

3. Circumstances in which (reversing the judgment of the Court of Session) a decree pronounced in 1782, in a question with an heir of entail, was held res judicata as to part of the subject matter thereof, in a question with a subsequent heir of entail. Maule v. Maule, August 27, 1833, - - - VI. 586.
4. Circumstances under which it was held (affirming the judgment of the Court of Session) that a decree in 1725, and another in 1778, constituted res judicata as to a right of fishing in the river Conon: And, in interpreting these decrees, certain boundaries laid down as marking the extent within which the parties had a right of fishing. Magistrates of Dingwall v. M<sup>c</sup>Kenzie, April 12, 1834, - - - VII. 306.

See *Entail*, 22. — *Foreign*, 3.

### RES NOVITER.

1. Found (affirming the judgment of the Court of Session) that deeds on public record cannot be regarded as instruments noviter reperta, so as to entitle a party to found on them under the rule res noviter veniens, &c. Grahame and Husband v. Grahame, June 14, 1825, - - - I. 353.
2. Circumstances under which a proof of facts alleged to be res noviter refused. Campbell v. Anderson, May 1, 1829, III. 384.

### RETENTION.

Held (affirming the judgment of the Court of Session) that a person employed to cut wood under the superintendence of the manager of the employer, and who was not in actual possession of the wood, had no right of lien or retention for payment of his wages. Callum v. Ferrier, June 17, 1825, - I. 399.

See *Lease*, 2.—*Right in Security*, 4.—*Superior and Vassal*, 2.

### REVOCAATION.

1. A husband purchased landed estates at a judicial sale, and executed a deed of conveyance and settlement, proceeding on the narrative, that “I am now resolved, in the event of my death “ before my titles to the said lands and estates are made up and “ completed, to convey the said purchase to and in favour of “ my dearly beloved wife,” and assigning and conveying such and such lands to his wife, “ her heirs, assignees, and disponees;” and thereafter he got from the Crown a charter of sale and resignation of these lands, to “ him, his heirs and assignees;” —Held (affirming the judgment of the Court of Session), in a question between the wife and the heir of her husband, that the conveyance to his wife was not revoked by the Crown charter. M<sup>c</sup>Arthur v. Jameson and others, March 22, 1825, I. 59.
2. A father by missive letter sold a piece of land, taking the purchaser bound to grant a bond in favour of himself in liferent, for his liferent use allenary, and of his sons nominatim in fee; and he caused his sons to sign a postscript to the missive, agreeing to allow the money to lie in the purchaser’s hands for

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### REVOCATION—*continued.*

eight years certain :—Held, in a question between the father and the creditors of the sons, (affirming the judgment of the Court of Session), that although no bond had been delivered, and no disposition prepared, the fee had irrevocably vested in the sons. Spence v. Ross, March 25, 1829, - - - III. 380.

See *Trust*, 11.

### RIGHT IN SECURITY.

1. Two parties were joint tenants of quarries, and sole partners of a company for working them; one of them became the landlord, and advanced a sum of money for the other, who, in security, granted an assignation of his share in the concern; and there was no publication of this deed, or express intimation to the manager of the quarries, till within sixty days of the grantor's bankruptcy;—The Court of Session having found, in a question with his creditors, that the assignee had acquired no preference, the House of Lords remitted to take the opinions of all the Judges. Earl of Breadalbane v. Russell (Campbell's Trustee), June 28, 1825, (see *infra*, 4,) - - - I. 620.
2. Held (affirming the judgment of the Court of Session) that the holders of heritable bonds, who had not used poinding of the ground, had no preference over the proceeds of the moveables found on the ground, in a question with personal creditors claiming under a sequestration of the estates of the proprietor. French or Hay and others v. Hay's Trustee, March 22, 1826, II. 71.
3. A mercantile company in possession of a lease of a printfield borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; the bank thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession was taken by the bank;—The Court of Session having held, in a question with the trustee on the sequestered estate of the company, that the assignation was not effectual against the creditors; a remit made to take the opinions of all the judges. Cabbell v. Brock, May 13, 1828, (see *infra*, 5,) III. 75.
4. Held (affirming the judgment of the Court of Session) that an *ex facie* absolute assignation of the share in a company, although qualified by a declaration in a back bond that it was granted in security of a specific debt, entitled the assignee to retain in security of a general balance arising on other debts subsequently contracted. Russell (Campbell's Trustee) v. Earl of Breadalbane, April 4, 1831, (see *supra*, 1,) - - - V. 256.
5. A mercantile company in possession of a lease borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; the bank thereupon granted a sub-lease to the company, who remained in possession and paid the rents; and no possession was taken by the bank.—Held, (affirming the judgment of the Court of Session,) without deciding the general question with respect to the sufficiency of intimation without possession, that the as-

## IN THE SEVEN VOLUMES.

### RIGHT IN SECURITY—*continued.*

signation was not effectual against the creditors. Cabbell v. Brock, Sept. 23, 1831, (see supra, 3,) - - V. 476.  
See *Partnership*, 13.—*Sasine*, 2.—*Trust*, 12.

### RIVER.

Held (varying the judgment of the Court of Session) that an heritor was not entitled to erect a bulwark, or any other opus manufactum, on the banks of the river Tay, which might have the effect of diverting the stream of the river, in times of flood, from its accustomed course, and throwing the same upon the lands of an opposite proprietor, although it was alleged that the bulwark was intended to protect the heritor's lands from the flood. Menzies v. Breadalbane, July 4, 1828, - III. 235.  
See *Ferry*.—*Lease*, 2.

### ROAD.

The uninterrupted use and enjoyment of a footpath by adjacent feuars, &c. as far back as the memory of man could extend, through the property of a party infest under titles which did not mention any such path prior to 1789, having been proved; and the proprietor having proved a series of interruptions from and after 1789, but which were resisted, and the use of the footpath continued; and the judge having directed the jury, 1, that, from the evidence of uninterrupted possession prior to 1789, they were entitled in law to presume forty years possession; and, 2, that the interruptions by the proprietor were not sufficient to defeat the right acquired by such possession:—Held (affirming the judgment of the Court of Session) that the direction was correct. Harvie v. Rodgers, &c., July 8, 1828, III. 251.  
See *Jurisdiction*, 5. 6.

ROYAL BURGH. See *Burgh, Royal*.

ROYAL PALACE. See *King*, 1.

RUN-RIG. See *Property*, 4.

### SALE.

1. Circumstances under which it was held (affirming the judgment of the Court of Session) that statements made by the agent of a seller to a purchaser relative to the shipping of certain bags of cotton wool at Liverpool to Glasgow did not amount to such a misrepresentation as to liberate the purchaser. Dunn v. McGavin and Co., Feb. 23, 1825, - - - I. 4.
2. A party purchased a property, and took the title in the name of his wife, and thereafter became bankrupt, and fled the country; and his wife in his absence conveyed the property to the trustee for his creditors, who exposed it to sale, under articles of roup, by which he bound himself to execute and deliver to the purchaser a valid irredeemable disposition; and the purchaser objected that the title granted by the wife was inept, and refused to pay the price; and the Court of Session having found that the trustee was not bound, at the expense of the bankrupt estate, to make any addition to the title, but only

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### SALE—*continued.*

- at the purchaser's expense:—Held (reversing the judgment) that the trustee was bound to give the purchaser a good and valid title, and that the one which he offered was not good. *Dick v. Donald and Cuthbertson*, Dec. 12, 1826, - II. 522.
3. Construction of the terms of a contract of sale. *Pentland v. Gwydyr*, Nov. 12, 1830, - IV. 322.
4. Grain, situated in a bonded warehouse, was sold by the occupier to another, who ordered it to be transferred to an agent making an advance on the faith of it; and the seller delivered his set of the keys to the agent, the other set remaining with the revenue officer:—Held (reversing the judgment of the Court of Session) that although no written agreement of transfer had passed between the seller and buyer, and no entry was made in the books of the revenue officers, yet complete delivery had been made to the agent, and that the statute 6 Geo. IV. c. 112. did not apply. *Maxwell & Co. v. Stevenson & Co.*, April 4, 1831, - V. 269.
5. Held (affirming the judgment of the Court of Session) that the purchaser of property at a public sale, who had successfully suspended a charge for payment on the ground of a defect in the title offered, and had frequently insisted for fulfilment, but who had never proposed to abandon the bargain, was not entitled, on a good title being offered after a lapse of eleven years, to refuse it on the pretext of being free altogether. *Dick v. Cuthbertson*, Oct. 1, 1831, - V. 712.
6. In defence to an action by a seller, raised in the burgh court of Glasgow, for payment of a balance of an account for iron purchased from him, the purchaser pleaded, 1st, that the iron was not sent within the time ordered; 2dly, that it was deficient in weight; 3dly, that it was of different sizes from those specified in the order. The seller maintained that he had fulfilled the terms of the bargain, and that the purchaser was at any rate barred by his silence and acquiescence. The burgh court sustained the defences; but the Court of Session, on advocacy by the pursuer, adhered to the Lord Ordinary's judgment, altering and decerning in terms of the libel, and found the advocator entitled to expenses in the inferior court and in the Court of Session. The House of Lords reversed the judgment of the Court of Session, and found the defender properly assoilzied by the burgh court, and remitted to the Court of Session to proceed as might be necessary to give effect to this judgment. *Robertson v. Harford and others*, March 6, 1832, - VI. 1.
7. Circumstances under which a purchaser of land, who had accepted a disposition, paid the price, and entered into possession;—Held (affirming the judgment of the Court of Session) not entitled to damage, on account of being disappointed in one of his alleged views for buying the lands, in consequence of the terms of a missive of lease held by the tenant of the land, and the existence of which missive the purchaser averred had not been disclosed to him. *Reddie v. Syme*, August 11, 1832, VI. 188.
- See *Entail*, 7. 22. 23.—*Lease*, 13.—*Partnership*, 15.—*Payment*, 1.

## IN THE SEVEN VOLUMES.

**SALMON FISHING.** See *Fishing*.

### SASINE.

1. Held *ex parte* (affirming the judgment of the Court of Session), in a question relative to a freehold qualification, that part of the name of one of the parcels of land enumerated in the sasine founded on having been written throughout the instrument on erasures, the sasine was not sufficient to establish the qualification. *Innes v. Earl of Fife*, June 20, 1827, - II. 637.
2. Held (affirming the judgment of the Court of Session), 1, that the omission of the Christian name of the bailie, where his surname and place of residence is given, is no objection to a sasine; 2, that although the Christian name of a witness be written on an erasure in the instrument of sasine it is no objection to it; and, 3, that a sasine proceeding on an heritable bond for a cash credit for 5,000*l.*, and three years interest thereon at the rate of five per cent., is good. *Morton v. Hunters and Co.*, Nov. 26, 1830, - - - - - IV. 379.
3. Found (affirming the judgment of the Court of Session) 1, that a precept of seisin is not exhausted by an unrecorded infeftment. 2, What discrepancy between the signature of a witness to a marriage contract and the name in the testing clause held not to invalidate the contract, or, on that ground, to render null an infeftment taken upon the contract. *Kibbles v. Stevenson, &c.* Sept. 23, 1831, - - - - - V. 553.
4. A crown charter of resignation in favour of a series of heirs of entail contained a clause of dispensation in favour of the heirs, for taking infeftment in diverse lands at the principal manor place:—Held (affirming the judgment of the Court of Session) to warrant an heir in possession to grant an heritable bond of annuity with a similar dispensation. *White's Trustee v. Wood's Trustees*, March 25, 1834, - - - - - VII. 147.

See *Burgh, Royal*, 1.—*Entail*, 22.

**SECONDARY EVIDENCE.** See *Proof*, 5.

**SEPTENNIAL PRESCRIPTION.** See *Prescription, Septennial*.

**SEQUESTRATION.** See *Bankruptcy*.

### SERVICE.

1. Thomas in 1748 executed a deed of settlement of his estates, and of those to be acquired by him, containing a simple destination, and procuratory of resignation in favour of his brother David, and the heirs of his body; whom failing, certain other substitutes; whom failing, his own nearest heirs whatsoever; the superiority of part of the lands being separated from the property; and he, after making up titles to the superiority, and in order to consolidate it with the property, gave a commission to a third party, who granted to him a charter of confirmation of the base right, and a precept of clare constat for the specific purpose of consolidation, on which he was infeft; thereafter he purchased certain parcels of lands, on which he was infeft; and for political purposes granted a procuratory of resignation for new infeftment of the greater



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### SERVICE—*continued.*

part of the lands included in the deed 1748 to himself, his heirs and assignees, in fee, on which he expedite a charter in 1774, but did not take infeftment; he died without issue, and was succeeded by David, who obtained a general service to him “*tanquam legitimus et propinquior hæres masculus et lineæ,*” and being infeft on the precept in the charter of 1774, he thereafter executed an entail in favour of a series of heirs, exclusive of the heirs whatsoever of Thomas, and died without issue; the intermediate substitutes under the deed 1748 having failed, the heir whatsoever of Thomas brought an action of exhibition against the heir succeeding in virtue of the entail, and a reduction of the titles made up by David, and of the entail:—Held (affirming the judgment of the Court of Session), 1, that the service of David to Thomas was effectual to convey to David the personal right of all the subjects specified in the settlement 1748, and contained in the charter 1774, and entitled him to execute the entail, but not as to lands not included in the charter of 1774; 2, that the terms “*heirs and assignees*” under the charter of 1774 did not necessarily imply the same heirs as those called by the deed of 1748; 3, that (without deciding the point of consolidation) as Thomas was vested in the personal right both of the superiority and property, that right was transmitted to David by his service; but, 4, a remit made to consider, whether the right to the lands which had been acquired by Thomas subsequent to the deed 1748, and not contained in the charter 1774, could be transmitted to David by the above service; and, 5, that the entail was sufficient to exclude the heir of Thomas from insisting in an exhibition of the previous titles. *Cathcart v. Earl of Cassillis and others*, May 31, 1825, - - - I. 239.

2. The proprietor of certain lands disposed them to a trustee for purposes expressed in a relative deed of instructions; and his two heirs-portioners, A. and B., on his death, granted a trust-bond, on which an adjudication was led, and which was thereafter assigned to these heirs; and they got a decree, reducing the deed of instructions, and ordaining the trustee to convey to them; he having disposed to them, with procuratory and precept, they were infeft on the latter; and one of them, A., died, and the other, B., obtained a general service as heir of A., and expedite a charter of resignation and confirmation on the procuratory, and was infeft; B. having died, after executing a deed of settlement in favour of trustees, conveying all her rights, and binding herself and her heir to give them an effectual title, her trustees thereupon obtained a charter of adjudication, and were infeft; and the heirs-portioners of line, both of A. and B., having expedite a special service to B., and obtained themselves infeft in the superiority of the whole subjects; and thereupon granted to themselves a precept of *clare constat* as heirs of A., and been infeft:—Held, in a competition, (amending the judgment of the Court

## IN THE SEVEN VOLUMES.

### SERVICE—*continued.*

- of Session,) 1, that the general service and charter of resignation could only vest in B. the superiority of her own and A.'s share of the lands; and therefore, as A. remained vested in the fee of the dominium utile of her share, her heirs were preferable to the trustees of B.; and, 2, that although B.'s general service conveyed to her A.'s personal right to the adjudication, yet, as B. had not made up titles to A.'s share of the lands, the charter of adjudication expedite by B.'s trustees could not exclude the heir of A. Trustees of Lady Ker v. Bellenden and others, June 17, 1825, - - - - - I. 381.
3. Held (reversing the judgment of the Court of Session) that a general service to an ancestor, where there has been a prior general service by another party to the same ancestor, is incompetent. Cochrane v. Ramsay, April 29, 1830, IV. 128.
4. A proprietor in fee simple executed an entail of his estate in favour of his eldest son and issue; whom failing, of the second son and issue; whom failing, of other substitutes, reserving his own liferent, and power to revoke, alter, sell, and burden the estate. The eldest son predeceased him, without taking infestment, and the reserved powers never were exercised; and the entailer at his death left the deed undelivered. The second son survived, but made up no titles. A general service was expedite in favour of his son, as heir of tailzie and provision of his grandfather, the entailer, and infestment followed under the precept in the entail:—Question remitted for the opinion of all the Judges; 1, Whether the service was valid? and, 2, Whether the service should have been to the eldest son, the institute in the entail, or to any other and what person? Colquhoun v. Colquhoun, Feb. 17, 1831, - - - - - V. 32.
5. Held (affirming the judgment of the Court of Session), in a question as to the validity of a service, that there was sufficient evidence before the jury to prove that the party served was the substitute called in a deed of entail, the party challenging having failed to establish the existence of any other person to whom the designation in the entail could apply. Galbraith v. Galbraith, March 1, 1831, - - - - - V. 84.
6. After a party had been served heir, another party obtained a service as heir by a nearer degree, and brought an action of reduction of the service of the party first served. The latter having brought a counter reduction, the Lord Ordinary, in that process, allowed the party second served a supplementary proof, and assisted the other action; and the Court, on advising the proof and supplementary proof, assoilzied from the counter reduction. But the House of Lords remitted to frame an issue or issues to try the propinquity of the parties respectively to the deceased. Watson v. Watsons, August 15, 1834, - - - - - VII. 535.

See *Entail*, 3.

### SERVITUDE.

1. In an action by the proprietor of houses and gardens in the town of Hamilton, to declare his right, generally, to take sand

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### SERVITUDE—*continued.*

and gravel from the banks of the river Clyde, the property of another party, found (reversing the judgments of the Court of Session) that, under his summons, he was not entitled to found upon the possession of persons, proprietors and occupiers of houses and gardens in the town of Hamilton similarly situated with his houses and gardens, but had a title only to insist as one of the inhabitants of the town, or as owner of certain lands therein, to the effect of having his right of servitude, in right of and for the use of his own properties, tried by a jury.—Circumstances under which the claimant to a right of servitude held to be not bound, in order to support his action, to plead a right of commonty in the subject to which the alleged servitude attached. Duke of Hamilton and Brandon v. Aikman, July 5, 1832, - - - - - VI. 64.

2. Circumstances under which, in the absence of any written title, a claim to thirlage, founded on prescriptive possession, was (affirming the judgment of the Court of Session) sustained. Circumstances under which the lightest thirlage, consistent with the facts of the case, was (reversing the judgment of the Court of Session) held to be constituted. Duke of Argyll v. Macalister, July 12, 1832, - - - - - VI. 98.

3. The Court of Session having found that the proprietor of a house, who had access to it through a contiguous area, disposed with its buildings and houses to another person, under an obligation to make an arched close for a cart entry to the area, with modified restrictions as to erecting buildings, and with the declaration that the area in question "shall be mean property for the preservation of light," had a right to load and unload carts in the area, the House of Lords reversed, and remitted with a declaration. Baird v. Ross, July 16, 1832, - - - - - VI. 127.

See *Burgh, Royal*, 1. 4.—*Clause*, 3.—*Property*, 3.—*Superior and Vassal*, 2.

SEXENNIAL PRESCRIPTION. See *Payment*, 2.

SI SINE LIBERIS, &c. See *Condition*, 3.

SLANDER. See *Reparation*, 4. 6.

SOCIETY. See *Partnership*.

### STAMP.

1. Question, Whether an unstamped obligation can be stamped after the cause has been heard in the Appeal Court? Miller and others v. Anderson, August 27, 1833, - - - - - VII. 12.

2. Held (reversing the judgment of the Court of Session) that a bill written on a stamp of lower value than required by law is null as a ground of action; and circumstances in which this was not obviated by other documents being libelled on. Robertson v. Ettles, April 5, 1834, - - - - - VII. 176.

See *Bankruptcy*, 12.—*Oath of Calumny*.

### STATUTE.

Found (affirming the judgment of the Court of Exchequer) that the lead and ore raised from the mines of Waterhead, &c.

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STATUTE—*continued.*

belonging to the Earl of Hopetoun, are only liable in the ad valorem duties of 10s. and of 1*l.* for every 100*l.* exported, in terms of the statutes imposing the same, but are exempt from all other duties. The King's Advocate v. Earl of Hopetoun, June 26, 1827, - - - II. 644.

1491. See *Aliment*, 1.

1661, c. 21. See *Bankruptcy*, 8.

1663, c. 21. See *Church*, 1. 3.

1681, c. 5. See *Writ*, 1. 2.

1685. See *Entail*.

1695, c. 5. See *Prescription, Septennial*.

1696, c. 5. See *Bankruptcy*, 6. 7. 16. 19.—*Jurisdiction*, 1.—*Process*, 33.—*Title to Pursue*, 2.

1701, c. 6. See *Jurisdiction*, 1.

6 Geo. I. c. 18. See *Insurance*, 1.

16 Geo. II. c. 11. See *Burgh, Royal*, 3.

43 Geo. II. c. 54. See *Jurisdiction*, 4.

10 Geo. III. c. 51. See *Entail*, 6.—*Heir and Executor*, 1.

25 Geo. III. c. 28. See *Public Burden*.

25 Geo. III. c. 51. See *Jurisdiction*, 3.

28 Geo. III. c. 58. See *Ferry*.

33 Geo. III. c. 74. See *Bankruptcy*, 2.

33 Geo. III. c. 138. See *Jurisdiction*, 5.

39 & 40 Geo. III. c. 98. See *Entail*, 15.

42 Geo. III. c. 116. See *Entail*, 7.

54 Geo. III. c. 137. See *Bankruptcy*, 8.

59 Geo. III. c. 35. See *Lease*, 6.

3 Geo. IV. c. 78. See *Reparation*, 7.

4 Geo. IV. c. 49. See *Jurisdiction*, 5.

4 Geo. IV. c. 62. See *Jurisdiction*, 3.

5 Geo. IV. c. 74. See *Lease*, 20.

6 Geo. IV. c. 112. See *Sale*, 4.

SUBSTITUTE OR CONDITIONAL INSTITUTE. See *Testament*, 8.

SUBMISSION. See *Arbitration*.

SUCCESSION. See *Testament*.—*Trust*.

SUPERIOR AND VASSAL.

1. The Court of Session having found that a clause in a feu-contract allowing subdivisions of the feu to be held of the superior, but declaring that all dispositions, conveyances, and infestments of the whole or any part of the lands shall be made out by the superior's agent, otherwise the same shall be null and void, was available to the superior to entitle him to reduce any deed or conveyance not prepared by his agent in terms of the original feu-contract;—The House of Lords remitted the case for review and the opinion of all the Judges. *Harley and others v. Campbell*, June 29, 1825, - - - I. 690.
2. Held *ex parte* (reversing the judgment of the Court of Session) that a vassal in an urban tenement is not entitled to retain his feu duties on the allegation that the superior has bestowed on

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### SUPERIOR AND VASSAL—*continued.*

him a servitude altius non tollendi over houses on the opposite side of the street, which had been violated; the vassal having been found to have right to enforce that servitude by having the houses reduced in height. *Governors of Heriot's Hospital v. Cockburn, Maxwell, and others*, May 23, 1826, II. 293.

3. Where a vassal was bound in a feu-contract to relieve the superior, and the lands, houses, teinds, and feu duties, of and from all multures which could be claimed furth thereof, "and that for all other burden, exaction, question, demand, or secular service which can any ways be exacted or demanded" for the same; and the feu duty was equivalent to the rent of the lands; and the superior from the date of the contract (a period more than 40 years) paid the minister's stipend;—Found (affirming the judgment of the Court of Session) that the superior could not throw the burden of stipend upon the vassal. *Governors of Heriot's Hospital v. M'Donald*, April 7, 1830, - - - IV. 98.  
See *Bankruptcy*, 18.—*Burgh, Royal*, 1. 4.—*Reparation*, 3.—*Trust*, 4.

SUSPENSION. See *Jurisdiction*, 3.

TACK. See *Lease*.

TAILZIE. See *Entail*.

### TEINDS.

1. Found (affirming the judgment of the Court of Session), 1, that a decree of approbation of a subvaluation pronounced in absence of the minister of the parish may be competently challenged by reduction; 2, that the feudal proprietor is the proper pursuer of an action of approbation; and, 3, that the minister who has been presented to the parish, and his presentation sustained, but who has not been inducted at the date of citation, and not the moderator of the presbytery, is the proper defender. *Duke of Gordon v. Gillan*, June 7, 1825, - - - I. 295.
2. The titular of the teinds of a parish entered into a submission with an heritor to ascertain the value of his teinds, and a decret arbitral was pronounced valuing the teinds, but the minister was no party;—Held (affirming the judgment of the Court of Session) that the heritor could not obtain a judicial approbation of that decret, whereby the rights of the minister would be affected. *Gordon v. Dunn and others*, Aug. 28, 1833, VII. 68.

See *Warrandice*.

TENDER. See *Expenses*, 4.

### TESTAMENT.

1. Held (affirming the judgment of the Court of Session), in a question with the next of kin, that a bequest to trustees was valid, whereby a testatrix appointed "the residue of her estate to be applied by my said trustees and their foresaids in aid of the institutions for charitable and benevolent purposes established or to be established in the city of Glasgow or neighbourhood thereof; and that in such way and manner, and in such proportions of

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TESTAMENT—*continued.*

- “ the principal or capital, or of the interest or annual proceeds  
 “ of the sums, &c. to be appropriated, as to my said trustees  
 “ and their foresaids shall seem proper ; declaring, as I hereby  
 “ expressly provide and declare, that they shall be the sole  
 “ judges of the appropriation of said residue for the purposes  
 “ aforesaid.” Hill and others v. Burns and others, April 14,  
 1826. - - - - - II. 80.
2. A husband and wife having disposed, by a trust settlement, their estates and effects to themselves jointly, for their joint and several liferents allenary, and to trustees in fee, declaring the settlement irrevocable at the death of either ; and bequeathed certain legacies, declaring, that “ in the event of the death of  
 “ any of the said legatees prior to the survivor of us, his, her, or  
 “ their legacy or legacies shall thereby fall and belong to their  
 “ executors or next of kin ;” and a legatee having survived one of the testators but predeceased the other ;—Held (affirming the judgment of the Court of Session) that the legacy belonged to the legatee’s nearest of kin as conditional institutes. Lawsons v. Stewarts and others, June 20, 1827, - - - II. 625.
3. Held (affirming the judgment of the Court of Session), in a question with the next of kin, that a mortis causâ conveyance to trustees was valid, whereby a testator declared, “ that it is my  
 “ wish that such remaining means and estate shall be applied in  
 “ such charitable purposes, and in bequests to such of my  
 “ friends and relations, as may be pointed out by my said dearly-  
 “ beloved wife, with the approbation of the majority of my said  
 “ trustees.” Crichton v. Grierson, &c., July 25, 1829, III. 329.
4. Where a trust deed of settlement for the foundation of an hospital for boys was blank as to the sum to be provided, and the number of boys to be admitted ;—Held (reversing the judgment of the Court of Session) that it was inept. Ewen v. Ewen’s Trustees, Nov. 17, 1830, - - - - - IV. 346.
5. A party by a probative testament appointed a person, who would not otherwise have succeeded, to be her executor, “ subject to  
 “ the payment of such bequests as I may instruct him to pay, in a  
 “ letter signed by me of this date, to the several persons therein  
 “ named ;” declaring, “ that after these several persons therein  
 “ named have been paid and discharged their several legacies,” the whole residue should belong to the executor ; and the testator died two days thereafter, leaving his will in her repositories, with a letter within it, containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by her, but not holograph nor tested ; which letter, it was offered to be proved, had been signed by the testator simul ac semel with the testament :—Held (reversing the judgment of the Court of Session) that it was competent to prove the identity of the letter with that referred to in the will ; and the case remitted, with an issue to that effect. Inglis, &c. v. Harper, Oct. 18, 1831, - - - - - V. 785.
6. Circumstances in which an obscurely worded deed of settlement

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### TESTAMENT—*continued.*

- was interpreted (affirming the judgment of the Court below) to mean, 1, that the division of the property was bipartite, or per stirpes, amongst the families of two nephews; and, 2, that trustees were bound to denude in favour of the minor children of the elder nephew when the eldest child of the younger nephew had attained twenty-one years of age.—Both parties found entitled to their expenses out of the property bequeathed. *Bryden and others v. Bryden and others*, April 22, 1833, - VI. 354.
7. Circumstances in which it was held (affirming the judgment of the Court of Session) that a testator's intention was to subject certain trust funds and estate to the payment of his debts, and to free certain property in England from that liability; and effect given to the testator's intentions. *Elliott's Trustees v. Earl of Minto*, June 1, 1833, - - - VI. 381.
8. A testator by his deed of settlement conveyed his whole property to his daughter, under the burden of paying 2,500*l.* to each of his two grandchildren at majority; and in case of the death of either of them without children, the survivor to succeed to the share of the predeceaser; and in the event of the death of both without children, the testator's daughter "to succeed to the whole of what is herein provided to them." The daughter granted an heritable bond to the grandchildren for their provisions with the same destination as in the settlement; one of them died in minority, unmarried and intestate, but the other survived majority, and called up the money in the bond, but died unmarried and intestate, before receiving payment:—Found (affirming the judgment of the Court of Session) that the representatives of the grandchild who survived majority (and not the testator's daughter) were entitled to succeed to the provisions; and that the heritable bond being merely a corroborative security made no change on the rights of the parties under the settlement. Question, whether the destination was a substitution or a conditional institution? *Greig and others v. Johnstone and others*, July 1, 1833, - - - VI. 406.
9. A grandmother directed her trustees to pay the residue of her estate to her grandson at Martinmas after his majority, and failing his surviving that term, or, if he did survive it, failing his specially disposing the same, to accumulate the residue for behoof of the children of the testatrix's daughter; the grandson survived majority several years, and obtained payment directly from the debtor of the testatrix of a sum due to her, which he commingled with his other funds, and he died unmarried and intestate:—Held that this sum belonged to the representatives of the grandson, and not to the children of the daughter of the testatrix. *Greig and others v. Johnston and others*, July 1, 1833, - - - VI. 406.
10. A father bequeathed a provision to his daughter in life-rent, and her children in fee, declaring that the provision should be in full of all that his daughter could claim from his estate:—Held (affirming the judgment of the Court of Session) that the right

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TESTAMENT—*continued*

- of the children to the fee was not affected by the daughter repudiating the provision, and betaking herself to her legal claims. *Dixons v. Fisher and others*, July 1, 1833, - VI. 431.
11. Question, (1.) As to the construction and effect of a clause in a deed of settlement, as to a party being bound to deduct a certain sum in the event of succeeding to a bond, from a provision in the deed of settlement? and, (2.) Whether a minor was sufficiently bound so as to prevent her resiling from an agreement by her legal guardians? *Adamson and others v. Darling and others*, July 16, 1833, - VI. 501.
12. Held (affirming the judgment of the Court of Session) that where a party had by a trust deed settled certain lands on one person, and left legacies to others, and provided for the sale of other lands for payment of the debts, legacies, &c., and to entail any residue that might be left, the legacies were not excluded by insufficiency of the fund provided for their payment, but were payable out of the trust estate generally. *Hamilton v. Bennet*, August 16, 1833, - VI. 533.
13. A party conveyed his property to trustees, with directions to pay the rents to J. during his life; and if he married and had children, to convey the property to him; but in the event of his marrying and having no children, to convey the property to W., his heirs and assignees whatsoever. W. predeceased J. without issue, and J. died without being married:—Held (affirming the judgment of the Court of Session) that no right vested in W. and J.; and that the heir of line, and not the heir of conquest, had right to the property. *Miller and others v. Miller and others*, August 27, 1833, - VII. 1.
- See *Compensation*, 1.—*Condition*.—*Foreign*, 2.—*Heir and Executor*, 2.—*Trust*, 1. 6.

TESTING CLAUSE. See *Writ*, 1.

THIRLAGE. See *Burgh, Royal*, 4.—*Servitude*, 2.

TITLE TO EXCLUDE. See *Prescription*, 3.

TITLE TO PURSUE.

1. An action having been brought by the keeper and depute keeper of the signet, and of the commissioners, treasurer, and procurator fiscal of the corporation or society of clerks or writers to the signet, (but not setting forth that they pursued on behalf of the society,) against a member of the body, to have it found that certain rules were legal and proper; that effect should be given to certain proceedings by them against that member for alleged infraction of the rules; and that they had power to suspend him from or deprive him of his office; and the Court of Session having sustained the title of the pursuers to sue, and decerned in terms of the libel;—The House of Lords reversed, and assoilzied the defender. *Graham v. Writers to the Signet*, June 21, 1825, - I. 538.
2. A party accepted a bill for the accommodation of the drawer,



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### TITLE TO PURSUE—*continued.*

from whom he received an heritable security in relief; and the bill was indorsed to the cashier of a bank in payment of a debt due by the drawer; the indorsation was thereafter reduced at the instance of the trustee for the creditors of the drawer on the act 1696, c. 5., reserving the rights of the bank against the acceptor; whereupon the cashier of the bank brought an action on the bill against the acceptor before an inferior court, which was advocated ob contingentiam of a reduction of the heritable security; and the Court of Session sustained the reasons of advocacy, and found that the bank had no right to sue on the bill; and the heritable security was reduced:—Held (affirming the judgment so far as it sustained the reasons of advocacy, but reversing it so far as it found that the bank could not sue on the bill) that as there was no evidence that the bank was participant in the granting to the acceptor the heritable security, they, and their cashier for their use, were entitled to maintain an action for payment of the bill against the acceptor. *Low v. Duncan*, June 12, 1827, - II. 583.

3. A mercantile company in possession of a lease of a printfield having borrowed money from a private bank, and granted an assignation of the lease in security to the bank, which was intimated to the landlord; and the bank having thereupon granted a sub-lease to the company, who remained in possession, and paid the rents; and no possession having been taken by the bank; and the Court of Session having held, in a question with the trustee on the sequestrated estate of the company, that the assignation was not effectual against the creditors; and the bank having appealed in name of the office-bearers;—Questions raised, but not decided,—1, Whether they had any title to appear? And, 2, A remit made to take the opinions of all the Judges on the merits. *Cabbell v. Brock*, May 13, 1828, - - - - - III. 75.
4. Held (affirming the judgment of the Court of Session), 1, that a party pursuing, as heir of entail in possession, a reduction of a sale of part of an entailed estate sold under a private act of parliament, and relative decree of the Court of Session, had no title to pursue, in consequence of having made up his titles to and possessed the entailed estate in contravention of the original entail, on which he founded his action; and, 2, that the principal pursuer having concluded that the defender should deliver up the lands to the pursuer as heir of entail in possession, the substitute heirs of entail, who insisted with him in the same summons, were also barred. *M'Culloch, &c. v. M'Kenzie*, July 18, 1828, - - - - - III. 352.
5. An appeal sustained in name of an unincorporated commercial banking company, and several of the individual partners, against a judgment of the Court of Session in a process in which they were defenders. *Commercial Banking Company v. Pollock's Trustees*, July 28, 1828, - - - - - III. 365.
6. Circumstances under which the title of the office-bearers of an

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TITLE TO PURSUE—*continued.*

unincorporated association to pursue was sustained. Downe, &c. v. Pitcairn, &c., June 24, 1829, - - - III. 472.

7. Circumstances of confidence between the seller and purchaser of an estate burdened with a bond, found to be no bar to the title of the purchaser to challenge the bond on the head of usury. Farquharson v. Barstow, Feb. 17, 1830, - - - IV. 9.
  8. A party called as heir to A., under a deed executed by B., having libelled his title to reduce a death-bed deed executed by A. as heir of provision of B.;—Held (affirming the judgment of the Court of Session), 1, that he had no title in that character to reduce A.'s deed; and, 2, that the defender was not barred from stating the objection, although he had joined issue on the merits, and a proof had been taken. Cogan v. Lyon and others, Dec. 4, 1830, - - - IV. 391.
  9. A lady who was served as heiress of entail, and "only child" of her father, held (affirming the judgment of the Court of Session) to have a sufficient title to insist for payment of rent falling under the executry. Lawson v. Ogilvy, July 8, 1834, - VII. 397.
- See *Death-bed*, 2.—*Entail*, 15. 22.—*Exhibition*.—*Lease*, 19.—*Process*, 12. 21.—*Fishing*, 2. 3. 4.—*Teinds*, 1.—*Trust*, 9.

TOWN CLERK. See *Burgh*, *Royal*, 4.—*Public Officer*, 1.

TRIENNIAL PRESCRIPTION. See *Prescription*, *Triennial*.

TRUST.

1. A party having conveyed to trustees his whole funds, interest and proceeds thereof, to be vested in lands which were to be annexed to his entailed estate, and bequeathed legacies, of which one was not payable for six months after his death; and his heir of taillie having claimed the interest of the funds from and after the day on which the truster died:—Held (affirming the judgment of the Court of Session) that he was not entitled to interest from that period. Earl of Stair v. Earl of Stair's Trustees, March 29, 1825, (see *infra*, 5, 6,) - - - I. 72.
2. A mother, who was vested in the fee of certain subjects, having conveyed them to trustees for the purpose, inter alia, of paying a specific sum of debt, an annuity to herself, and conveying the free residue to her children nominatim, on which infestment followed; and having thereafter executed a supplementary trust-deed authorizing the trustees to dispose of the subjects for a larger debt than that specified in the first deed:—Held (reversing the judgment of the Court of Session, and affirming that of the Lord Ordinary,) that she was not entitled to execute the second deed, and that her children were entitled to have it reduced. Turnbulls v. Hay's Trustee, April 15, 1825, - I. 80.
3. A husband and wife, along with other parties, having been named trustees under a deed of settlement,—Held (affirming the judgment of the Court of Session) that the wife was entitled to act and vote as a trustee. Stormonth's Trustees v. Stormonth, May 11, 1825, - - - I. 188.
4. A party having by missive feued a piece of building ground in his

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### TRUST—*continued.*

- own name, and thereafter alleging that he had done so on behalf of a married woman, to whom he desired the feu-charter to be granted in liferent, excluding her husband's *jus mariti*, and to her children in fee; and an action having been brought by her to compel the proprietor to execute the deed accordingly:—Held (reversing the judgment of the Court of Session) that there was no evidence of the trust to affect the proprietor, and that he was not bound to execute the feu-charter so demanded. *Campbell v. Steele and Lang*, May 23, 1826, - - - II. 334.
5. A party having by a trust-deed conveyed his whole funds, interest and proceeds thereof, to trustees, to be vested in lands which were to be annexed to his entailed estate; and the heir at law and of tailie having claimed the interest of the fund not invested in land from and after the expiration of a year from the death of the truster; and the Court of Session having assoilzied the trustees from the claim;—The House of Lords remitted to take the opinion of all the Judges. *Earl of Stair v. Earl of Stair's Trustees*, May 24, 1826, (see *supra*, 1,) - II. 414.
6. A party who had executed a deed of entail, having also made a trust-deed of settlement or will, by which he appointed his trustees, after paying certain legacies and annuities to particular persons, "to lay out the residue of the trust funds, interest and "proceeds thereof," in purchasing lands to be annexed to his entailed estate, for the behoof of the heirs of entail seriatim, the trustees being paid out of the trust estate the expenses disbursed by them in relation to the trust; and the first heir of tailie, who was also heir at law, having claimed the interest of the fund not invested in land from and after the expiration of twelve months from the death of the truster:—Held (reversing the judgment of the Court of Session), 1, that as the trust deed imported a gift to the several heirs of entail of the residue of the funds thereby conveyed, and which were to be invested in land for their behoof, therefore each of them, including the appellant, was entitled to the interest and proceeds of the trust-funds arising from and after the period of twelve months, usually allowed by the law of Scotland for payment of legacies, until the whole of these trust funds, together with the interest prior to the twelve months, should be invested in land, in terms of the deed; 2, that these trust-funds, including the interest prior but not subsequent to the expiration of the twelve months, were subject to the expenses of the trust; and, 3, that the interest arising subsequent to the above period was chargeable with the expenses of the collection and application thereof, and also with those of the appeal. *Earl of Stair v. Earl of Stair's Trustees*, June 19, 1827, (see *supra*, 1,) - - - II. 614.
- A party having conveyed his estate to trustees for behoof of a contingent heir, whom failing, other substitutes, with a general assignation of rents for behoof of the contingent heir,—Held (affirming the judgment of the Court of Session) that the heir at law had no claim to the rents arising between the death of the

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TRUST—*continued.*

- party and the succession of the heir. *Graham v. Templer*, April 1, 1828, - - - III. 47.
8. A person having conveyed a right in a depending action to trustees and their assignees, and the trustees having died without assigning, and the next of kin (who was interested in the subject of the trust) having confirmed as executor to the truster, and a creditor of the next of kin having adjudged the right;—Held (affirming the judgment of the Court of Session) that the creditor had a good title to pursue the action. *Kirkpatrick v. Innes and Gavin*, March 17, 1830, - - - IV. 48.
9. Six trustees having been appointed under a deed of settlement, and any three declared to be a quorum while so many were alive, and all having accepted, but one having objected to a loan of part of the trust funds, and declared he would no longer act, and the number having been reduced, including the objector, to three, and he having refused to concur in the discharge required on the loan being repaid;—Held (affirming the judgment of the Court of Session) that he was bound to concur both in that and in all future proper and necessary acts of administration. *Ouchterlony v. Lynedoch and M'Donald*, July 7, 1830, - - - IV. 148.
10. Circumstances under which an assignation of a lease *ex facie* absolute was held (affirming the judgment of the Court of Session) to have been granted in security only, and to be redeemable by the heir of the assignor, on repaying to the assignee the advances made by him in relation to the lease. *Reid v. Lyon*, July 16, 1832, - - - VI. 114.
11. Held (affirming the judgment of the Court of Session), 1, that a trust disposition of heritable subjects in Scotland of which the granter should die possessed, and referring to trust uses as specified in any will executed or to be executed by him, constitutes, with a will executed in England according to the English forms, an effectual conveyance of the heritage in Scotland for the purposes set forth in the English will; 2, that it was no objection to the disposition that the disponees were described as executors under a will which was afterwards revoked, they being otherwise properly designed; and, 3, that a Scotch conveyance of heritage cannot be revoked by a deed not probative by the law of Scotland, although probative by the place of its execution. *Cameron v. Mackie and others*, August 29, 1833, - - - VII. 106.
12. A party granted heritable bonds over his estate, and thereafter executed a trust-deed for behoof of his creditors, reserving to himself a certain annuity, and providing that the trust should not cease on the death or resignation of the trustee, and pointing out the manner in which a new one should be chosen; and the creditors acceded to it:—Held (reversing the judgment of the Court below) that, although the trustee was dead, an heritable creditor was barred from applying for sequestration of the rents. *Hamilton v. Littlejohn*, July 8, 1834, - - - VII. 380.
- See *Bankruptcy*, 18.—*Condition*, 2.—*Entail*, 15. 25.—*Heir and Executor*.—*Expenses*, 3. 9.—*Foreign*, 4, 5.—*Testament*.

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TUTOR AND CURATOR. See *Minor*.

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USURY. See *Interest*, 1.

VICENNIAL PRESCRIPTION. See *Entail*, 3. (4.)

WADSET. See *Entail*, 1.

WARRANTICE.

A titular and patron, possessing under an unrecorded entail, sold teinds, and bound himself and his heirs and successors to warrant them from all future augmentations:—Held (affirming the judgment of the Court of Session) that the purchaser's successor was entitled, without discussing the heirs of line of the seller, to go against the heir of entail for relief of all augmentations subsequent to the sale. *Duke of Roxburghe v. Kerr*, August 7, 1833, - - - VI. 526.

See *Adjudication*.—*Lease*, 18.

WITNESS. See *Proof*, 4.—*Writ*, 1. 2.

WRECK.

Circumstances under which (affirming the judgment of the Court of Session) a party dispossessing a salvor was found liable in damages and reparation to the owner of the vessel, and interest allowed on the expense of extracting the Judge Admiral's decree. *M'Douall v. M'Dowall*, March 8, 1825, - I. 22.

WRIT.

1. Held (affirming the judgment of the Court of Session) that a testing clause, naming and designing certain persons who signed as witnesses, but not expressly stating that they were witnesses to the subscription of the granter, was effectual. *Wemyss v. Hay*, April 19, 1825, - - - I. 140.

2. Held (affirming the judgment of the Court of Session) that it is a valid ground of reduction of a deed, that one of the instrumentary witnesses neither saw the granter subscribe nor heard him acknowledge his subscription. *Duff v. Earl of Fife*, May 22, 1826, - - - II. 166.

3. Question, Whether an obligation to grant a discharge of an heritable bond requires to be holograph or tested? *Miller and others v. Anderson*, August 27, 1833, - VII. 12.

4. The name of the debtor, in the Will of a caption, being written on an erasure,—Held (affirming the judgment of the Court of Session) that the caption did not afford legal evidence of bankruptcy, although the name was written correctly in the horning and charge, in the narrative of the caption, and the messenger's execution of search. *Duncan v. Houston*, August 15, 1834, - - - VII. 519.

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NOTE.—Where the letter *v.* is placed between the names of the parties, the first name is that of the Appellant and the second is that of the Respondent; where it is placed after both names, the first is that of the Respondent and the second that of the Appellant.

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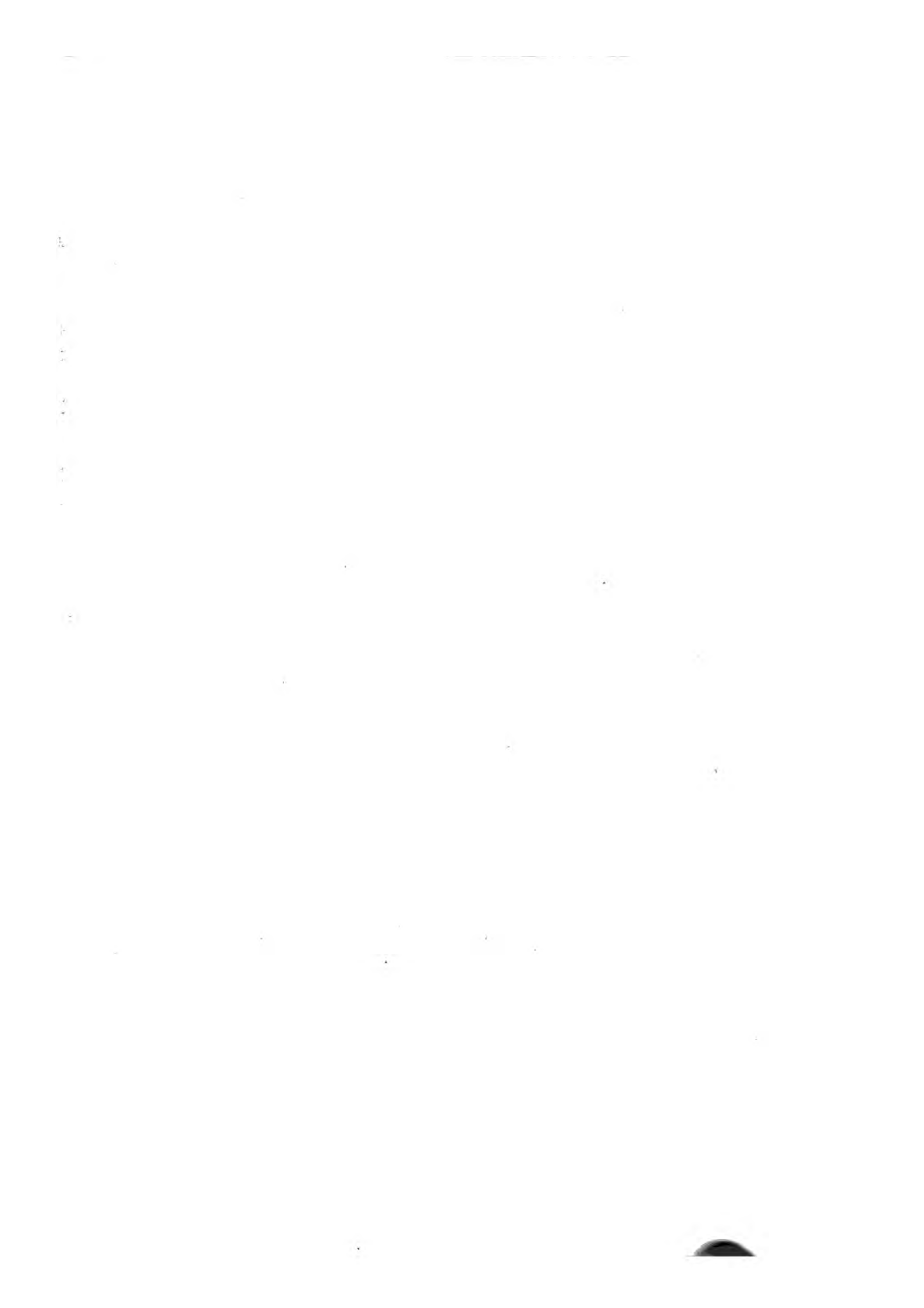


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Handwritten text, possibly bleed-through from the reverse side of the page. The text is mostly illegible due to blurring and low contrast, but appears to be organized into several lines or paragraphs.



